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NEOMA E. STORM, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
LESTER F. M. STORM, Appellee.	)	COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks to enforce her divorce decree option, given to repurchase jointly owned real estate within 90 days from the date of the decree. The appeal filed in the Supreme Court was transferred here for disposition.

The divorce decree, approved by both parties and entered March 29, 1957, directed monthly payments to plaintiff for alimony and child support, directed a division of jointly owned real estate, and gave plaintiff an option to purchase from defendant vacant real estate for the sum of $10,000 at any time within 90 days from the entry of the decree.

On May 2, 1958, with leave of court, plaintiff filed her amended petition to enforce the option, representing that she had notified defendant of her intention to exercise the option within 90 days from the date of the decree, and that she was then and now ready, able and willing to exercise the option and to pay the defendant the sum of $10,000 under the terms and conditions of the option, and that defendant failed and refused to convey the property as provided in the decree. Defendant answered, denying that plaintiff had made a bona fide offer to purchase within the 90 days prescribed in the decree.

assign and quitclaim his entire beneficial interest in the trust upon payment to him, by plaintiff, of the sum of $12,500 within 30 days from the date of the issuance of the title policy, and in the event of her failure so to do, the title to the property shall vest in Reilly absolutely.

Where a party has an option to purchase, the acceptance or exercise, to be valid, so as to conclude an agreement or contract between the parties, must, in every respect, meet and correspond with the offer, neither falling short of, nor going beyond, the terms proposed, but exactly meeting them at all points and closing with them just as they stand. Morris v. Goldthorp, 390 Ill. 186, 195.

The decree in the instant case made the payment of $10,000 an essential condition to the exercise and acceptance of the option. The delivery of the deed and the payment of the purchase price were to be concurrent. Although the decree made no mention of title conditions, and merely directed a conveyance of the right, title and interest of defendant, plaintiff was entitled, if the option was properly exercised, to a conveyance which would vest in her an unencumbered fee simple title, and if there were any such questions of title, a timely request to the court could have secured proper protection for plaintiff.

We do not agree with the contention of plaintiff that tender was unnecessary until she had evidence of good title. A proper tender was a condition precedent to the option ripening into a contract. The giving of notice by plaintiff to defendant,

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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

February Term, A. D., 1959

Term No. 59-F-7. Agenda No. 5

CHARLES R. BIRCHER,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	Appeal from the
VS.	)	Circuit Court of
	)	St. Clair County.
GOEDDE LUMBER COMPANY, a Corporation,	)	
	)	
DEFENDANT-APPELLANT.	)	

Per Curiam

Plaintiff brought suit in the Circuit Court of St. Clair County against defendant for recovery of sums allegedly due him on a written employment contract. The defendant counterclaimed for the balance due on a promissory note of plaintiff. The jury's verdict for plaintiff was reduced on post-trial motion and judgment entered thereon and also on the verdict rendered for defendant on its counter-claim. Defendant appeals from both judgments, contending the judgment on the note should have included interest. Plaintiff also cross-appeals from the action of the trial judge in reducing the verdict for plaintiff before entering judgment thereon. The principal issue is the sufficiency of the evidence to support the two judgments.

In 1941 plaintiff commenced his employment with defendant as an accountant. The principal stockholders and co-managers of the business were Edmund Goedde, president, and his cousin, Bernice Goedde. Under the terms of plaintiff's written contract with defendant and the co-managers, plaintiff was to receive a salary of $250.00 per month and a percentage of the earnings. The provision of the contract covering termination of employment reads as follows:

> "In the event either wishes to terminate this agreement, six months' written notice must be given by either the Employers or Employee. If the Employers decide to terminate this agreement, an amount equal to an additional six months' semi-monthly payments as hereinafter set forth must be made to the Employee at the expiration of the six months' notice. Further, should this agreement be terminated at any time after the beginning of a new calendar year, the payment based on profit hereinafter stipulated must be made to the Employee for the entire year in which this agreement is terminated at the expiration of said calendar year."

After more than ten years of apparently mutually satisfactory and profitable relations, plaintiff and the Goeddes reached a parting of the ways. Plaintiff's version was that Edmund Goedde, in February, 1952, suddenly told him he was going to terminate the contract because plaintiff was becoming too big in the eyes of the employees and he objected to the employees always going to plaintiff for instructions; that during the week following there were various conversations among the parties and an attempt through the company's attorney to end the

dispute by agreement; that any hope of such agreement ended when Edmund Goedde stopped payment on a $6,600.00 check payable to plaintiff as his share of 1951 earnings and plaintiff thereupon removed from the company safe a stock certificate in his name for 55 shares of capital stock of the company pledged as security for plaintiff's note of $2,666.66 in payment therefor. On the advice of an attorney, the stop order was rescinded and plaintiff received his 1951 bonus. However, he would not return the stock certificate until a settlement was reached. This position led to plaintiff being told to get out and get a lawyer. On cross-examination as adverse witnesses, and on their own behalf, Edmund and Bernice Goedde testified to a version different in details but with the same ending; that there was a clash of personalities between plaintiff and all the employees but that they were trying to work out a settlement of their differences with plaintiff until he removed the stock certificate; that they considered this dishonest and told him to leave and bring in the certificate; that three days prior thereto, however, the employees had all been told that plaintiff was going to leave the company and that they were to take no further orders from him; that no written notice of termination was ever served on plaintiff though the company's attorney

had been instructed to prepare one.

Defendant's position on this appeal is that plaintiff is owed nothing because he walked off the job without a written termination notice and abandoned his contract; that, therefore, he is not entitled to the termination benefits provided. Further, defendant contends that if the contract terms do apply, that plaintiff was required to work during the period of the six months' notice to be entitled to the benefits. Plaintiff urges, on the other hand, that his contract was, in fact, terminated by defendant under conditions making it impossible to remain for six months; that he was, therefore, entitled to his 1952 share of earnings (stipulated to be $4,186.28), six months' pay of $1,500.00 for the notice period he was not permitted to work, and an additional six months' pay provided by the contract as a termination benefit. The jury agreed with plaintiff's contention and brought in a verdict for $7,186.28. The trial court, however, reduced this amount by $1,500.00 on the ground that plaintiff was entitled only to the six months' termination bonus plus his share of 1952 earnings.

We find ample support in the evidence for the conclusion of the jury and the trial judge that plaintiff did not abandon his employment. Abandonment sufficient to cause a forfeiture of the termina-

tion benefits would have to be wholly unilateral action. The evidence here discloses active participation by defendant in plaintiff's departure. Regardless of who created the unpleasant relationship, defendant admits that it took steps to terminate it. Plaintiff was barred from the premises except to return the stock certificate. Had he acceded to this demand on the naive assumption that his job was secure, he would have run into an unfriendly and intolerable climate and defendant's announced intention to terminate the employment. Having taken the action it did in 1952, defendant's argument of abandonment by plaintiff is untenable. Nor can the absence of a written termination notice be of aid to defendant. This is a condition of termination which could be enforced or waived by the party acted against. Having determined that plaintiff did not abandon his contract, it follows that the provision for written termination notice was for his protection. By his action he has waived such provision.

Having thus concluded that plaintiff did not forfeit his rights by abandonment, we also concur in the interpretation given the termination clause by the trial judge. The six months' termination benefit to be paid "the employee at the expiration of the six months' notice" plus his share of 1952 earnings is clearly due him. The right to six

months' compensation added by the jury, eliminated by the court, and contended for on cross appeal by the plaintiff is less clear. Plaintiff says that but for Edmund Goedde's attitude he would have been entitled to employment during this period of notice. However, there is no showing by plaintiff of a willingness to continue the employment, no formal tender of his services, nor any evidence of an effort to mitigate his damage. The evidence of the poor feeling prevailing and the impasse in their settlement negotiations point to the conclusion of a mutual waiver of plaintiff's continued service during the notice period. This was also apparently plaintiff's theory in his complaint. The trial judge was correct, therefore, in reducing the judgment.

Both parties raise an issue as to their right to interest on their respective judgments. Defendant's claim to interest on plaintiff's note is foreclosed by evidence that interest was not to be charged on the notes of the parties given in exchange for shares of stock. The jury heard the evidence offered on this matter and their conclusion is clearly not against the manifest weight of such evidence. Nor do we feel plaintiff is entitled to interest under Chapter 74, Paragraph 2 (Ill. Rev. Stat. 1957) on the money determined to be due him. The issue of plaintiff's right to said sum

was contested in good faith and any delay can scarcely be said to fall within the usual meaning of "unreasonable and vexatious." Woodruff vs. City of Chicago, 394 Ill. 542, 69 N.E. 2d 287. Especially is this true when defendant had a clear and substantial offset to any claim by plaintiff.

We have considered defendant's contention with respect to an instruction given on plaintiff's behalf and find it without merit. For the reasons stated, the judgments appealed from are affirmed in all respects.

Affirmed.

Hoffman, J., took no part.

Publish Abstract only.

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Abstract

1st DIVISION

A

General No. 11275 Agenda No. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

February Term, 1959

ROBERT K. PERRIN, Plaintiff-Appellee, vs. RUTH L. PERRIN, Defendant-Appellant.	)	Appeal from the Circuit Court of Boone County.

DOVE, J.

Upon the complaint of Ruth L. Perrin, appellant herein, the circuit court of Boone County, on April 1, 1955, granted her a decree of divorce dissolving her marriage with appellee, Robert K. Perrin. That decree recited, among other things, that the parties thereto had made a complete property settlement by the provisions of which Mrs. Perrin obligated herself to execute, immediately after the entry of the contemplated divorce decree, a promissory note for $5000.00 payable to the order of Robert K. Perrin, three years after date with interest at the rate of 5% per annum, interest payable semi-annually.

The property settlement agreement, referred to in the divorce decree, was executed by the parties on March 30, 1955. The note for $5000.00 was signed by Mrs.

Perrin and delivered to the payee Robert K. Perrin. Thereafter and on September 1, 1955, Mrs. Perrin paid to her former husband the interest thereon amounting to $125.00 and on April 1, 1956 paid to him a like amount of interest.

The note contained the usual warrant of attorney and on September 11, 1957 Robert K. Perrin obtained a judgment thereon by confession in the circuit court of Boone County. On May 28, 195. this judgment was, upon motion of the defendant, vacated and defendant granted leave to plead. A trial was had and on July 11, 195. an order was entered reinstating the judgment as of the date of its rendition, September 11, 1957. On October 24, 1958 defendant filed her motion to vacate the order of July 11, 1958, which motion was, on October 31, 1958, denied. On December 18, 1958 appellant filed in the circuit court a notice of appeal. This was five months and seven days after the circuit court had entered its final order on July 11, 1958 which reinstated the judgment which had been rendered by confession on September 11, 1957. The filing of a motion by appellant in the circuit court on October 24, 1958 to vacate the order entered on July 11, 1958 was ineffective for any purpose as it was filed three months and thirteen days after the judgment of the circuit court had become final.

No further steps were taken in the case after December 18, 1958 when appellant filed his notice of appeal in the circuit court, until March 14, 1959. On that day appellant filed in this court the record on appeal, an abstract of record

and a ten page printed document which bears, on the outside cover, these words: "Petition for leave to appeal or in the alternative, Statement, Brief and Argument of Appellant".

After stating that the order of July 11, 1958 was entered by the trial court when counsel was not present, counsel for appellant states in this document filed on March 14, 1959, that if this court concludes that appellant's notice of appeal filed in the circuit court was ineffective to afford appellant a review of the record of the trial court that then appellant asks "leave to appeal pursuant to the provisions of section 76, Chapter 110, Ill. Rev. Stat. 1957. The record (140-153) adequately describes defendant's position without further argument".

With the record in this condition counsel for appellee, on April 11, 1959 entered the appearance of appellee herein and filed in this court an additional abstract of record and also a fourteen page printed document bearing this legend: "Motion to dismiss the petition for leave the appeal and answer to statement, brief and argument of appellant". Thereafter appellant filed a reply brief and on April 24, 1959 the cause was reached on the call of the docket. Oral arguments were made by counsel for the respective parties, and the cause was submitted upon the briefs filed and oral arguments of counsel and taken under advisement.

The Civil Practice Act provides that application for leave to appeal shall be by petition and affidavit showing that there is merit in appellant's claim for appeal and that failure to file notice of appeal within 60 days from the entry

of the judgment complained of was not due to appellant's culpable negligence. (Ill. Rev. St. Chap. 110, sec. 76).

The instant petition was not verified nor was there any showing, by affidavit, that there is merit in appellant's claim for an appeal or that the failure to file notice of appeal within the sixty day period provided by law was not due to appellant's culpable negligence. Appellant has woefully failed to comply with the applicable provisions of section 76 the Practice Act and an order denying appellant's petition for leave to appeal and dismissing the appeal would not be inappropriate. Appellee, however, in his brief and argument requests the affirmance of this judgment. By so doing he will be deemed to have abandoned his motion to dismiss appellant's petition for leave to appeal. (Springfield Iron Co., v. McIntyre, 72 Ill. App. 444) Furthermore a motion to dismiss an appeal comes too late after an appearance by appellee and a joinder in error. (Price v. Pittsburg, Ft. Wayne and Chicago R.R. Co., 40 Ill. 44; Matson v. Connelly, 24 Ill. 142) In actual practice the filing of appellee's brief is equivalent to a joinder in error and by joining in error appellee waived the right to move to dismiss the appeal. (Finlen v. Foster, 211 Ill. App. 609, 621; Diamond v. Piggly Wiggly Central Co., 236 Ill. App. 68; Farrell v. West Park Commissioners, 182 Ill. 250,252). By joining in the submission of this case on its merits appellee is in no position to insist upon his suggestion that the appeal be dismissed or urge that appellant's motion for leave to appeal be denied.

In her amended affidavit filed in support of her motion to open up the judgment which the trial court had ordered to stand as defendants answer to the complaint, appellant, in the most general terms, stated that the note which forms the basis of this proceeding was obtained by undue influence and duress on the part of the appellee; that she did not fully comprehend what she was doing and that the payee therein gave no consideration therefor. After the judgment was opened up and defendant granted leave to plead the plaintiff was required to prove his case as if no judgment had been entered. (Curtin v. Kinney, 304 Ill. App. 257) By introducing the note sued on which was admitted in evidence appellee made a prima facie case. The settlement agreement heretofore referred to was also identified and appellant testified that the note offered in evidence was the one referred to in the property settlement agreement and was executed by her in the office of her attorney in Belvidere during the divorce "preliminaries". She further testified that she and her husband were both represented by counsel and that she paid to appellee $125.00 interest on September 1, 1955 and a like amount again on April 1, 1956.

We have read the abstract prepared by counsel for appellant and the additional abstract prepared by counsel for appellee and considered the briefs and arguments of counsel. The note which forms the basis of this action was given in connection with the property settlement agreement entered into by the parties in the office of appellant's attorney in connection with appellant's suit for divorce against appellee.

Thereafter a decree granting appellant a divorce and the relief she sought and particularly referring to this property settlement agreement was rendered. Appellant recognized the validity of that decree and also her liability upon the note by paying, upon two occasions, the interest thereon as therein specified. Upon the hearing the trial court granted appellant every opportunity to establish a defense to the note but appellant was unable to do so and the record does not sustain her charge that she was imposed upon when she executed the property settlement agreement or the note which is the basis of this action nor does it appear that appellant did not fully comprehend what she was doing when she executed these instruments.

This is an unusual record. Rather than dismiss the appeal or enter an order denying leave to appeal for failure to comply with the provisions of the Practice Act we have concluded to consider the merits of this litigation. We have done so and conclude that the judgment sought to be reviewed is the only proper order which the trial court could have entered under the pleadings and the evidence found in this record. Accordingly that judgment order is affirmed.

Judgment affirmed.

SPIVEY, P.J. and McNEAL, J. CONCUR

Abstra 1st District

NO. 11239 ABSTRACT AG. 13

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

FEBRUARY TERM, A. D. 1959

HARRY STARAC, Plaintiff-Appellant, vs. JOHN CORSALE, Defendant-Appellee.	Appeal from Circuit Court, LaSalle County.

McNEAL, J. -

Plaintiff, Harry Starac, brought this action to recover damages for personal injuries sustained when the automobile which he was driving collided with one driven by the defendant, John Corsale. Judgment was entered on a verdict for $1000 in favor of plaintiff, and he appeals.

The collision occurred about 2:30 A.M. on June 26, 1955, on Route 6 between Ottawa and LaSalle. From Ottawa the highway extends west about six miles to the Osage curve where it turns to the north and then back toward the west, and continues westward about one-half mile farther to the north. Prior to June 26 this section of the highway had been relocated so as to straighten the curve, and the pavement had been widened. One layer of blacktop had been applied to the westbound lane and two layers to the eastbound lane,--so that the eastbound lane was somewhat higher than the westbound lane and there was a slight ridge in the center of the road. Speed zone signs indicating a maximum of 45 miles per hour and "bump" signs had been erected near the curve.

Plaintiff, aged 29 and single, resided in Ottawa. About

NO. 11429

[illegible]

HENRY DRAKE

[illegible]

NORM [illegible]

[illegible]

MORTAGE [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Route [illegible]

west [illegible]

and then [illegible] mile [illegible] highway had been relocated [illegible] pavement had been widened. [illegible] the westbound lane was larger [illegible] eastbound lane was somewhat higher than the [illegible] and there was a slight ridge in the center of the road. Posted zone signs indicating a maximum of 45 miles per hour and "hump" signs had been erected near the curve.

Plaintiff, aged 29 and single, resided in Ottawa. About

11:00 P.M., on June 25, he drove his 1952 Cadillac convertible on Route 6 from Ottawa to LaSalle. He was accompanied by his friend, Felix Norman. They visited two taverns in LaSalle, and plaintiff had two small bottles of beer in each place. As they were returning to Ottawa and traveling eastward at 45 to 50 miles an hour, they met defendant going in the opposite direction at the Osage curve. Defendant's car ran over into plaintiff's lane and hit his car almost head-on. Plaintiff's car came to rest on the south side of the road and commenced to burn.

Defendant resided in LaSalle. About 10:00 P.M. on June 25 he drove his 1951 Oldsmobile on Route 6 from LaSalle to Ottawa. He was accompanied by his friend, Anton Sampo. They visited two taverns in Ottawa. As they were returning to LaSalle and traveling westward along the curve at 55 to 60 miles an hour, defendant's car hit the ridge in the road, went out of control over the ridge, struck plaintiff's car in the eastbound lane, and then rolled on westward 125 to 200 feet.

Plaintiff's theory on appeal is that the jury was coerced into returning a verdict by improper remarks of the trial judge, and that the jury awarded plaintiff inadequate damages, contrary to the manifest weight of the evidence.

After the jury had retired and had deliberated about five hours, the bailiff informed the judge that the jury could not agree. The jury was returned to the courtroom about 10:00 P.M., and in the presence of counsel for both parties, the judge said to the jury: "Do I understand that you cannot agree upon a verdict? Is there any possibility at all that you can agree?" The jury nodded assent, and the judge said: "Will someone speak up? What seems to be the trouble?" Mrs. Fleming, one of the jurors, replied: "Well, there is a possibility we could agree, but we are unable to understand the instructions. Perhaps if the court would help us out on a few of these instructions,

maybe we could get together." The judge replied: "No, I cannot do that. But you can certainly use your common sense and experience in life in order to figure out these instructions. This is an easy case. This case is costing the county a lot of money to try, and the attorneys have both worked very hard on the case. They deserve a verdict. I think that what I am going to do is send you out again and see if we can't get a verdict yet tonight." Plaintiff's attorney objected as follows: "You are instructing the jury and they are going to feel compelled to return a verdict which undoubtedly will be a compromise verdict." The court disagreed with counsel and said: "I am not instructing the jury. I am going to send them back again." About twenty minutes later the jury returned a verdict in plaintiff's favor for $1000.

These conversations between the judge and jury were not recorded by the reporter at the time they occurred, but appear in a statement made to the court the next day by plaintiff's attorney as to his recollection of the events which occurred the previous evening, and also in his affidavit attached to plaintiff's post-trial motion. Defendant's attorney does not contend that the version of the events presented by plaintiff's attorney is not correct, but insists that the judge said nothing to the jury which was either prejudicial or detrimental to either party .

The length of time a jury may be required to deliberate upon a verdict is a matter resting in the sound discretion of the trial judge (35 I.L.P. 284; Chicago City Ry. Co. v. Shreve, 128 Ill. App. 426, 478, affirmed 226 Ill. 530), and is dependent upon the length of the trial and the complexity of the issues involved. This trial was commenced on April 3 and the verdict was returned on April 9. Considering the time spent on the trial of this case, we think that the jury was not compelled to deliberate upon their verdict for an excessive length of time, and that the remarks of the judge were

appropriate. There was no re-instruction of the jury as to the law of the case. References to the expense of the trial and the energies expended by counsel were no more extensive than were obvious to the jury. The judge's statements were eminently fair and impartial as between the parties and did not suggest that the jury should reach any particular conclusion. If his remarks had any effect, the result was a verdict against defendant. In our opinion the jury was not coerced into returning a verdict by the remarks of the trial judge and plaintiff was not prejudiced thereby. Williams v. Yellow Cab Co., 11 Ill. App. 2d 112, 117; The People v. Golub, 333 Ill. 554, 561.

As a result of the collision plaintiff sustained two fractures, one at the base of the second metacarpal of the right hand and the other of the non-weight bearing portion of the left femur, a laceration over his left eye, and a concussion. The laceration was closed with eight stitches. An aluminum splint was applied to plaintiff's right hand and he was immobilized for fifteen days, but no cast, traction or weights were applied on account of the injury to his hip. He was in the hospital for about two weeks, then on crutches until the first of August, and returned to his employment as an inspector at the glass factory in Ottawa on October 31. Physicians testified for plaintiff that there was no evidence of atrophy or permanent impairment of motion of his wrist, fingers or hip joint.

Plaintiff's expenses amounted to $200 for medical care, $225.40 for hospital, and $40 for clinical services. He contends that the jury failed to consider his claims for damages for pain and suffering and for loss of wages amounting to $2400 for four months, or at least to $1000 to $1200 until August 15 when he was discharged by his physician.

Although plaintiff claimed damages in excess of the jury's award, it does not follow that the verdict was so inadequate as to require a new trial. In considering the amount of damages for personal injuries, it was the jury's function to determine the credibility of

the witnesses and the weight of their testimony. Likewise the extent and permanency of the injuries, the pain and suffering sustained, the reasonableness and necessity of the expenses incurred, and the impairment of plaintiff's earning capacity were all questions for the jury. 15 I.L.P. 613, Damages Par. 261. The amount of damages was primarily a question of fact for the jury to determine. Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 49. In Ford v. Friel, 330 Ill. App. 136, 140, the Court said: "The question of damages is peculiarly one of fact for the jury, and where the jury has been correctly instructed upon the measure of damage, and it is not claimed nor shown that the size of the verdict clearly indicates it was the result of prejudice or passion on the part of the jury, the award should not be disturbed on review. Lanyon v. Lanquist & Illsley Co., 157 Ill. App. 316 (certiorari denied by the Supreme Court); Princell v. Pickwick Greyhound Lines, Inc., 262 Ill. App. 298." While the latter case deals with the question of excessive damages, we are of the opinion that the same rule applies in determining whether the damages awarded were inadequate. Kaptain v. Overgaard, 19 Ill. App. 2d 483, 154 N.E. 2d 105.

We find no error in the record justifying a reversal of the judgment of the Circuit Court of LaSalle County, and the judgment is therefore affirmed.

Affirmed.

SPIVEY, P.J., and DOVE, J., concur.

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CHARLES URNEST, Appellant,	)	APPEAL FROM SUPERIOR COURT,
v.	)	COOK COUNTY.
SABRE METAL PRODUCTS, INC., and EDWARD YUCIS, Appellees.	)	

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from an order entered in the Superior Court of Cook County striking plaintiff's amended complaint, on the ground that he failed to state a cause of action, and dismissing his suit.

The plaintiff's amended complaint consisted of two counts. The first count in substance alleged that on or about April 2, 1956 the defendant Sabre Metal Products, Inc., by Edward Yucis, its agent, authorized an offer to the plaintiff in order to induce him to become the general manager of the company; that "in consideration of his services, the offer provided that the plaintiff receive $200.00 per week and a bonus of 20% of the annual profits of the corporation. The relationship was to continue until otherwise dissolved by agreement of the parties"; that Edward Yucis, the founder, dominant stockholder, president and general manager of the said corporation, under the authority given him by the corporation, submitted the offer orally to the plaintiff; that the plaintiff accepted the offer and assumed complete production control of the business subject only to the direction of the president and board of directors; that the

plaintiff was discharged on June 21, 1957. The plaintiff also alleges that the corporation confirmed and ratified the acts of the president by accepting the services of the plaintiff, and paying the weekly salary agreed on, together with a part of the bonus money to which the plaintiff was entitled. It is further alleged that the corporation further ratified the agreement by causing it to be reduced to a written memorandum which is set out in full. That memorandum is headed: "Conditional Employment Contract between E. Yucis and C. Urnest, Plant Manager." The memorandum provides that the plaintiff is to be employed at a salary of $13,000 per year, sets out in detail his duties and also provides for a bonus as was previously alleged. There is no indication in the pleading that the memorandum was ever executed by the corporation nor as to when it was made out. The first count further alleges that plaintiff was paid $14,125 as compensation for his services from April 1956 through July 1, 1957 and that such payment represents $1,125 paid under the bonus agreement. A tabulation is set out showing the weekly payments which the plaintiff received commencing April 21, 1956 and ending July 1, 1957. The first five weekly payments are $150; the next nine payments $175; the next thirty-one $200; the next eight $225; the next eleven $250; and one payment of $225, designated as vacation pay. The first count also included the following schedule:

"Salary Increases

4/21/56	$150.00
5/26/56	175.00
7/28/56	200.00
3/2/57	225.00
4/27/57	250.00"

Count one further sets out, on information and belief, the net profits of the corporation for the period and alleges that under the alleged bonus agreement the plaintiff was owed $10,875 by the corporation. This count of the complaint prays for an accounting and that an order be entered directing the defendant corporation to pay the plaintiff 20% of the net profits from April 15, 1956 through and including June 21, 1957.

The second count is against the defendant Edward Yucis, and in substance alleges that Yucis on or about April 2, 1956 had represented to the plaintiff that said defendant was the president of the Sabre Metal Products, Inc.; that he was the general manager and dominant stockholder and that in such capacity he was empowered to offer the plaintiff the position of general production manager of the corporation at a salary of $200 a week together with a bonus of 20% of the annual net profits of the corporation; that the plaintiff in good faith accepted the offer and performed his duties faithfully from April, 1956 to June 21, 1957, when he was discharged; that he received a part of the bonus money referred to but not all of it; that when he requested that the remainder of the bonus be paid he was assured by the defendant Yucis it would be paid to him and that at the time Yucis knew that the corporation had not authorized his acts; that the plaintiff believed and relied on the representations of Yucis; and that "as a result of the deceit, misrepresentation and fraud practiced upon him by the defendant, Edward Yucis, he has been damaged * * *." Count two prays for judgment against Yucis in the sum of $10,000.

Sabre Metal Products, Inc. and Yucis filed separate motions to strike the amended complaint. The court on June 17, 1958 sustained the motions and dismissed the suit. The plaintiff appeals from that order.

The only question presented to us is whether either or both counts of the amended complaint state a cause of action.

The amended complaint is inartificially and ineptly drawn. It would be a gross understatement to say that the allegations in either count are not a model of clarity. It is elementary that on a motion to strike all well-pleaded allegations in the complaint are admitted by the defendant. Hence in the instant case the defendants admit plaintiff's allegations in the first count that he was offered by Yucis, the president of the defendant corporation, $200 a week, together with a bonus of 20% of the annual profits of the corporation, and that he accepted the offer and was general manager of the corporation until his discharge on June 21, 1957. The defendants also admit that the corporation confirmed and ratified the acts of the president and paid the plaintiff the weekly salary agreed on, together with a part of the bonus money to which he was entitled.

The defendants' motions to strike the amended complaint were based on the grounds that the amended complaint failed to set forth a cause of action against either of the defendants; that from the amended complaint it appears that the plaintiff received no bonus during the period of his employment and the

amended complaint shows that the plaintiff received no bonus payments whatsoever; that nowhere in the amended complaint does it appear that "one single cent was ever paid to the plaintiff as a bonus"; that the plaintiff became an employee of the defendant corporation on a strictly salary basis and he knew that under the statute Yucis could not bind the corporation to a bonus agreement. In the motion made by the Sabre Metal Products, Inc. it is set out, concerning the alleged bonus agreement, that "the plaintiff concedes that this Corporation did not authorize Edward Yucis to act for it relative thereto."

In this court the defendants argue that the specific allegations in count one of the amended complaint negate the general allegations with reference to the payment of the bonus, and they base that argument upon the fact that under the schedule set out in count one all the payments received by the plaintiff were received as salary and that in the complaint the difference between the plaintiff's starting salary and his salary at the end of the term was explained as salary increases. They contend that consequently the specific allegations do not show that the plaintiff was at any time paid any bonus money as he alleges in his general allegation.

The figures in plaintiff's schedule of payments in his complaint are not totaled and apparently were not added by the defendants. If it was true that all the money paid to the plaintiff by the corporate defendant was money included in the schedule, then there would be a sound basis for the defendants' contention. However, this is not true. The plaintiff in his

general allegations alleges that he received from the defendant corporation $14,125 for the period from April 21, 1956 to July 1, 1957 and of that amount $1,125 was a payment made under the bonus agreement. According to the schedule in the complaint the payments received by the plaintiff from the defendant corporation, when totaled, amount to $13,300. If we would take the figure alleged to be a bonus payment and add it to $13,300, the total paid plaintiff would amount to $14,425 instead of $14,125. The calculations of the plaintiff are inaccurate, but such a mathematical inaccuracy in the complaint, standing alone, is not sufficient ground to strike the complaint and justify dismissal of the suit. The complaint, as admitted by defendants' motions to strike, shows that the plaintiff was paid a sum in excess of the salary payments and that such sum was a bonus payment.

A party dealing with a president of a corporation is entitled to assume that he has authority to make contracts for the corporation which are within the scope of its corporate powers and which do not violate any statute or rule of public policy. Vulcan Corp. v. Cobden Machine Works, 336 Ill. App. 394. On a trial the plaintiff would, of course, be required to prove his allegations. Count one of the amended complaint states a cause of action.

Count two of the amended complaint prays for judgment against defendant Edward Yucis. It sufficiently states a cause of action in a case for fraud and deceit. Martin v. Sixty-third & Halsted State Savings Bank, 299 Ill. App. 123. The allegations

in count two are inconsistent with and contradictory of the allegations of count one; however, such pleading is permitted under section 43 (2) of the Civil Practice Act (Ill. Rev. Stat. 1957, chap. 110, par. 43 (2)). Freeman & Co. v. Regan Co., 332 Ill. App. 637. The theory is that on the trial the proof will determine on which set of facts, if any, the plaintiff is entitled to recover. Where the pleading is in the alternative in different counts, each count stands alone and the inconsistent statements contained in a count cannot be used to contradict statements in another count. The intent of the cited section of the Practice Act is that counts can be pleaded in the alternative regardless of consistency. The other objections made to count two are the same as those made against count one, which we have previously discussed.

The order of the Superior Court of Cook County is reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

Dempsey and Schwartz, JJ., concur.

Abstract only.

47611

CLEVELAND HURT, LILLIE MAE HURT, LINNETTE HURT, a minor, by LILLIE MAE HURT, her mother and next friend, and DWIGHT HURT, a minor, by LILLIE MAE HURT, his mother and next friend, Appellants,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
SOLAMON SPRATT and MORRIS KORZEN, Appellees.	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The plaintiffs appeal from an order dismissing their dram shop suit against the defendant Morris Korzen, because it was not commenced within the time limitation of one year provided by the Liquor Control Act. (Ill. Rev. Stat. 1955, ch. 43, §135.)

The sole question presented is whether the time for bringing dram shop actions is governed by the Liquor Control Act or by the Limitations Act (ch. 83, Ill. Rev. Stat. 1957) and, specifically, if the recommencement provisions of the latter (para. 24a, ch. 83) are applicable to dram shop cases which have been dismissed. The identical problem was before this court a short time ago.

Korzen was an operator of a tavern and the complaint alleged that he sold liquor to the defendant Spratt who, while intoxicated, stabbed the plaintiff Cleveland Hurt. Hurt's wife and minor children alleged that the personal injuries received by him injured their means of support. The present suit was filed in March 1958. A previous one

had been started in 1955, but was dismissed in February 1958 for failure to show reasonable diligence in obtaining service of process upon Korzen.

Thompson v. Cappasso, 21 Ill. App.2d 1, decided very recently by the second division of this court, parallels the present case. It was a suit for personal injuries commenced under the Liquor Control Act. The action arose in 1951; the suit was filed in 1952, and it was dismissed for want of prosecution in 1956. The plaintiffs filed a new suit in 1957. The court held that a motion to dismiss the second suit was properly granted; it decided that an action for personal injuries under the Liquor Control Act did not come within the provisions of the Limitations Act.

The only difference between the Thompson case and the present one is that this one is for injury to means of support as well as for personal injuries.

The Limitations Act provides:

> "§14: Actions for damages for an injury to the person...shall be commenced within two years next after the cause of action accrued.
>
> "§15: Actions...for an injury done to property... shall be commenced within five years next after the cause of action accrued."
>
> "§24. In any of the actions specified in any of the sections of this act,...if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff,... may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

In the Thompson case the court stated: "The Dramshop Act includes 'injuries to means of support' as another right of action based upon the intoxication of a person, or in consequence thereof. This action is not within the classes of cases specified in the Limitations Act."

The court concluded: "that the legislature, by the 1949 amendment, did not intend that the provisions of the Limitations Act should be applied to causes of action filed under the authority of the Dramshop Act."

The decision in Thompson v. Cappasso is controlling. We concur with the opinion of the court in that case and we extend its application to dram shop actions for loss of support. Because the authorities cited and the arguments advanced were the same in both cases, it is not necessary to repeat them here, nor is it necessary for us to again review the reasons for our conclusion.

The order of the trial court, dismissing the complaint against the defendant Korzen, is affirmed.

Affirmed.

McCormick, P. J., and Schwartz, J., concur.

Abstract only.

119

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47688

JOHN DALY, LE ROY J. McDONALD, LE ROY SMITH, WILLIAM LAMPRECHT, FRANCIS AMBROSE, THOMAS E. RYAN, JR., GERRY STREJC, WALTER KINSELLA, ROBERT McCUE, EDWARD GETZ, ARTHUR J. SELLERS, Plaintiffs-Appellees, v. DOLORES L. SHEEHAN, JOHN J. AHERN, ALBERT W. WILLIAMS, JAMES S. OSBORNE and ROBERT QUINN, Defendants-Appellants.	INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered December 23, 1958, granting a temporary injunction restraining the members of the Civil Service Commission of the City of Chicago and the secretary of the Commission from striking plaintiffs' names from an eligible list for promotion to captain posted in 1952. The order also overruled a motion to strike the complaint and dismiss the suit.

Plaintiffs are lieutenants in the classified service of the Fire Department of the City of Chicago. On February 25, 1952, the Civil Service Commission held a promotional examination for captain. Each of the plaintiffs took that examination. On November 12, 1952, a list was posted showing the relative standing of plaintiffs and other successful applicants for the position of fire captain. Between November 12, 1952 and December 29, 1952, various applicants with standings below those of plaintiffs were, because of military credits, advanced in their relative positions on the list, and on

December 29, 1952, a revised list was published.

The following charges of wrongdoing occurring subsequent thereto are made in the complaint on information and belief: that persons not entitled thereto were given credit for efficiency ratings, when no such standards existed; that persons not entitled thereto were given military credits in excess of their actual service, or for service in some component part of the military service which was not a component of the Armed Forces; and that military credits had been given to the same persons in the examination for promotion to the position of lieutenant, contrary to law; that the credits thus given resulted in persons thus credited being fraudulently and wrongfully placed ahead of plaintiffs; that the revised list was frequently revised to prefer certain applicants by permitting them to file requests for preference by revision of military credits; that the promotion of plaintiffs to the position of captain was further delayed by the restoration of several men to the position of captain after more than one year's leave of absence, and by the restoration of persons to the eligible list whose waiver of appointment had not been withdrawn within the time permitted by the rules of the department; and that there were persons in the classified civil service in the position of fire captain and higher, whose age was greater than the permitted age for retention in such service and who, if they had accepted their pensions, would have created vacancies, to be filled by plaintiffs.

All the foregoing charges are made in the general terms in which they are here stated, without names, dates, times or places. Moreover, these vital averments, making charges of fraud on the part of the city and its personnel, are made on information and belief. No details to supplement such broad general charges are anywhere given in the complaint nor in an affidavit attached thereto. To sustain a temporary injunction, something more than mere general charges should be made. The facts must be stated with particularity. Peoples Gas Light and Coke Co. v. Cook Lumber Terminal Co., 256 Ill. App. 357; 21 I.L.P., Injunctions, Sec. 121. This is especially true where the acts charged are of a fraudulent and corrupt character.

Under Section 10 of the Civil Service Act (Illinois Revised Statutes, 1957, Ch. 24-1/2, Par. 48) power is vested in the Civil Service Commission as follows:

> "Said commission may strike off names of candidates from the register after they have remained thereon more than two years."

The list in question was posted December 29, 1952. This suit was filed December 9, 1958. Six years had elapsed since the posting of that list. The power of the Civil Service Commission to cancel the list because it was more than two years old is amply sustained by the following cases: People ex rel. Walsh v. City of Chicago, 226 Ill. App. 409; People ex rel. Lynch v. City of Chicago, 271 Ill. App. 360; People ex rel. Jahn v. City of Chicago, 279 Ill. App. 624; People ex rel. Richards v. Allman, 289 Ill. App. 586.

Plaintiffs' long delay in commencing this suit is

nowhere adequately explained. In civil service cases, the need for prompt action on the part of those aggrieved has been recognized in many decisions. City of Chicago v. Condell, 224 Ill. 595; Gay v. City of Chicago, 228 Ill. 310; Clark v. City of Chicago, 233 Ill. 113; People ex rel. Balenger v. O'Connor, 13 Ill. App.2d 317, 327; People ex rel. Kennedy v. Hurley, 348 Ill. App. 265. In People ex rel. Balenger v. O'Connor, supra, we examined at some length the defense of laches in civil service cases and stated that there was a duty resting on the petitioner in that case to assert his claim promptly. In People ex rel. Kennedy v. Hurley, supra, p. 277, we said that prompt action was necessary not only because of the prospect that a municipality might become liable in damages, but because of the demoralizing effect of such delay on the discipline of the executive branch of the government; and that to confront an executive after many years with long harbored grievances would present great difficulties in the maintenance of morale and discipline. While the instant case does not involve reinstatement, much of the same reasoning applies.

It has been repeatedly held that equity concerns itself with civil matters. There are exceptions, as in People ex rel. Hurley v. Graber, 405 Ill. 331, which involved an attempt by blanket order, without statutory authority, to demote innumerable civil service employees—an entirely different situation from the instant case.

The order as it relates to the grant of a temporary injunction was erroneous. However, that portion of the order overruling the motion to strike and requiring defendants to answer is not an appealable order. Inasmuch as we have found that the complaint does not state a case for injunction and as that is the relief sought, we are in effect holding that the motion of the city should be sustained, but we are not entering an order on that phase of the case. The order granting a temporary injunction is reversed and the cause is remanded, with directions to take such further proceedings as are consistent with the views herein expressed.

Order reversed and cause
remanded with directions.

McCormick, P. J., and Dempsey, J., concur.

Abstract only.

718

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47691

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Defendant in Error,	)	ERROR TO MUNICIPAL
	)	
v.	)	COURT OF EVANSTON.
	)	
RICHARD N. GALLUZZO,	)	
	)	
Plaintiff in Error.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This case comes to this court on writ of error to review a conviction for petit larceny. A jury was waived, and trial was had before the court. The court found defendant guilty and sentenced him to serve five days in jail and to pay a fine of $100. Defendant's principal contention is that he was not proved guilty beyond a reasonable doubt.

Defendant is employed as a night switchman by the Milwaukee Railroad. He lives with his parents on the northwest side of Chicago, and has no criminal record. He has a penchant for attending rummage sales. Impelled by this avocation, he set out on his bicycle, attired in his work clothes (two coats, two shirts, two pair of pants, and gummed rubber sole shoes) on October 29, 1958, for a publicly advertised rummage sale in Evanston.

The sale was held in a three-story building containing ten or twelve rooms. In one room defendant saw a hat—a used, brown $20 Dobbs hat—on top of a seven and a half foot shelf. He tried it on, found it a little large, reshaped it, and set about looking through the other rooms of the sale. Shortly thereafter, the complaining witness,

a Dr. Galloway, noticed that his hat was missing from the place he had stored it. He looked about the building until he found his hat located on defendant's head. He called the policeman stationed at the sale and had defendant arrested for theft of his hat. Upon his arrest and at all times thereafter, defendant admitted that the hat was not his, but contended that he intended to pay for it. The hat was not, in fact, for sale, but was the personal property of the complaining witness.

In a prosecution for larceny (Illinois Revised Statutes, Ch. 38, Par. 387, Sec. 167) it is incumbent on the People to prove that the person alleged to have committed the crime took the property in question from the owner thereof with felonious intent. People v. Quinn, 411 Ill. 97. Felonious intent in this context is the intent to deprive the owner permanently of his property. This element must be proved beyond a reasonable doubt. The test is no different if the case is tried before a judge. People v. Trefonas, 9 Ill.2d 92. We find that the People have not proved intent beyond a reasonable doubt.

From the very moment defendant was accosted by the police officer, he denied an intent to deprive the owner of his property. He admitted that the hat was not his, and stated he intended to purchase it. We must view this within the framework of the facts. This occurrence took place at a rummage sale. While most of the clothes were tagged and hanging on racks, not all of them were so placed and designated. The People have not proven that defendant

left the room where he took possession of the hat, intending not to pay for it. Not all rummage sales require payment for an article at the counter where it was procured. Defendant also testified that he was looking for a hat with a better fit. Finally, defendant had almost a half hour from the time he tried on the hat until his arrest to leave the place of sale. Were he trying to steal the hat, it is incredible that he would have stayed on the premises looking at other items until arrested.

Defendant's manner of dress was not unusual for a switchman. He had attended a public sale in response to an advertisement in a neighborhood newspaper, and he had in his possession enough money to make a purchase. All these factors, taken as a whole, establish that the People did not prove defendant guilty beyond a reasonable doubt.

Judgment reversed.

McCormick, P. J., and Dempsey, J., concur.

Abstract only

108

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47747

THOMAS NORKUS and JOSEPHINE NORKUS, Plaintiffs - Appellees, v. MORRIS LITBERG, FROZEN BAKER, INC., and EXCHANGE NATIONAL BANK OF CHICAGO, a corporation [sic] Defendants ——————— THE EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association, Defendant - Appellant.	INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to rescind the sale of a "business," for a refund of the sums paid to the sellers Litberg and Frozen Baker, Inc., upon the purchase price, and for an injunction.

The day after the suit was filed an injunction issued without notice and without bond, on plaintiff's motion, restraining the Bank from paying out moneys held for sellers and from taking any action upon plaintiff's trust deed to the Bank, as trustee, to secure a note for the balance of the purchase price. The Bank appealed.

Neither in the complaint nor petition were there any facts pleaded from which we can determine whether the chancellor was justified in waiving notice and bond. It is not enough that the injunction order recite that "for good cause shown" the notice and bond were waived. There were no findings of fact to show what the "good cause" was. The record therefore does not

justify the finding of "good cause," Lee v. Morris, 326 Ill. App. 555. For this reason we think the chancellor abused his discretion in ordering the injunction to issue and the order is hereby reversed, Tri Square Realty Corp. v. Bressler, 17 Ill. App.2d 336.

REVERSED.

LEWE, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

724

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47681

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff - Appellant, v. WILBERT SAUNDERS, Defendant - Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the State's Attorney of Cook County from an order granting a new trial on defendant's motion under Sec. 72, C.P.A (Ch. 110 Ill. Rev. Stat [1957]). Our courts hold such an action is civil in nature and appealable by the state, People v. Green, 355 Ill. 468, 473, People v. McArthur, 283 Ill. App. 467, 468.

The defendant was arrested August 5, 1958, after he sped through a red light and drove north in the southbound lane of the Outer Drive at 51st Street. Just before he was arrested the police saw him throw "something" out of the car. This turned out to be a revolver which defendant identified as his.

An information was filed against him August 22, 1958, and on September 12 defendant appeared without counsel and asked for a continuance. On September 12 he was tried by the court without a jury, found guilty of carrying a concealed weapon, and was sentenced to one year in the House of Correction. On October 10 he filed a petition to vacate the judgment and the same day a motion for a new trial.

Hearing on these motions was continued from time to time on defendant's motions to October 27, 1958, on which date his motion in arrest of judgment was filed. The several motions were denied on October 27.

On October 29, 1958, defendant filed his motion under Sec. 72 "to vacate, or in the alternative to modify," the judgment of conviction of September 12, 1958. The motion sets out substantially the same grounds stated in the previous motions which had been denied. The State's Attorney moved to dismiss the motion. The court denied the motion to dismiss and sustained defendant's motion and granted a new trial. It is from this order that the appeal has been taken.

The motion to dismiss admits the allegations of the motion under Sec. 72 (People v. Dugan, 401 Ill. 442). Defendant was not represented by counsel, and was unfamiliar with court procedure; was not advised of his right to counsel or to a jury trial or to subpoena witnesses; did not knowingly waive his right to a jury trial; was not given a copy of the information or advised of the nature of the charge against him; did not knowingly and understandingly enter his plea; and was not aware of the consequences of a plea of guilty. The motion admits, too, that the court questioned defendant without advising him of his privilege against self-incrimination and did not inform him of the offense of which he was found guilty and sentenced, and that at the time of his arrest he did not have concealed, on or about his person, the revolver.

The court knew at the trial that defendant was not represented by counsel and knew that he was not advised of his right to counsel, to a jury trial or to subpoena witnesses. The court knew that the defendant was not given a copy of the information or advised of the charge against him, that he was questioned without being advised of his privilege not to testify, and was not informed of what offense he was found guilty and sentenced. Defendant's attitude, manner of testifying and other indications of his lack of familiarity with court procedure were within the court's observation. So also was his lack of a knowledgable waiver of his right to a jury trial. We conclude that none of the foregoing grounds asserted in the defendant's motion under Sec. 72,presented "matters of fact not appearing in the record, which, if known to the court at the time the judgment was entered, would have prevented its rendition," Glenn v. People, 9 Ill.2d 335, 340, People v. Budasi, 287 Ill. App. 117.

There remains the fact that when defendant was arrested he did not have "concealed on or about his person, the revolver." It is apparent that the trial court, on reading the transcript offered in support of the motion under Sec. 72 thought that the evidence was insufficient to support a conviction. This, however, is not a basis for allowing the motion. The Supreme Court has held that a writ of error coram nobis does not lie to correct false testimony or to consider newly discovered evidence, People v. Touhy, 397 Ill. 19. A fortiori it does not lie to review a finding of guilty on the same evidence.

There is language in People v. Dugan, 401 Ill. 442, 445-447, which indicates that the Supreme Court favors a broad sweep for this motion, but in that case there were facts unknown to the trial court at the time of sentence which would have precluded the sentence. We see nothing inconsistent with our conclusion and the decision in People v. Wojdas, 309 Ill. App. 382.

For the reasons given the judgment is reversed and the cause remanded with directions to deny the defendant's motion under Sec. 72.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

123

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47698

ELSA M. OLESEN, Plaintiff - Appellant, v. LAFAYETTE FISHER, in his trust capacity as escrowee under instrument dated July 25, 1946, Defendant - Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for an accounting in which plaintiff alleges breach of a fiduciary duty by defendant Fisher in failing to return an escrow deposit made by plaintiff with defendant on July 25, 1946. Defendant's motion for summary judgment was sustained and the suit was dismissed. Plaintiff has appealed.

The action stems from an attempt by plaintiff to purchase the "Albion Shores Apartments Hotel" in Chicago. The contract to purchase said building was executed on July 10, 1946. The seller was designated as "The Trust Company of Chicago" and the contract was signed by Lafayette Fisher "as duly authorized agent in this behalf." Plaintiff delivered to Fisher, as escrowee, earnest money payments totalling $25,000.00, $15,000.00 of which was paid in cash and $10,000.00 by delivery of a note upon which defendant later recovered judgment.

Plaintiff sought recovery of this $25,000.00 in an action against Fisher, The Trust Company of Chicago, and A. Kamenjarin, a broker involved in the transaction. A final judgment in this action was entered against plaintiff on May 27, 1953. The court found no fraud on the part of any of the

defendants. Plaintiff appealed that judgment and this court affirmed (4 Ill. App.2d 372). These are the only facts essential to our decision here. A more complete statement of the facts can be found in our previous opinion.

The question for decision here is whether the court below was correct in awarding summary judgment against plaintiff on the ground that the prior adjudication is a bar to maintenance of the present action.

Plaintiff contends that the defense of former adjudication is not applicable here since Fisher is being sued presently in a trust capacity, as escrowee, whereas the prior suit was brought against him as an individual. Defendant argues that in reality the same parties are involved in both actions. Defendant also contends that an escrowee is not a trustee, but in our view of the case it is not necessary to determine this issue. We are of the opinion that plaintiff is bound by the prior suit no matter how she describes Fisher or his capacity.

Defendant does not dispute plaintiff's argument that identity of parties is necessary before the defense of former adjudication will lie. But the requisite identity is present if, though nominally different, the parties are substantially the same, Bayer v. Bloch, 246 Ill. App. 416, Voorhees v. Chicago & Alton R. Co., 208 Ill. App. 86. "It is sufficient for the purposes of the rule relating to a former adjudication that the

parties be substantially the same," Hanna v. Read, 102 Ill. 596 (emphasis ours). The U. S. Supreme Court has pointed out that "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different... and parties nominally different may be, in legal effect, the same," Chicago, R. I. & Pac. Ry. Co. v. Schendel, 270 U. S. 611, 620.

It is true that plaintiff sues defendant as escrowee in this action and sued him individually in the previous suit. But we see no substantial significance in this fact. As we view the previous suit, even though the Master did not expressly find that defendant in that suit occupied a dominant position and that plaintiff reposed confidence in him, the pleadings set forth facts which would have supported the theory of a fiduciary because plaintiff alleged she was not versed in the hotel business, had no lawyer, and that defendant was a lawyer and drew the documents. The theory was apparently not advanced, for the Master found that plaintiff had failed to prove fraud and did not expressly find that defendant was a fiduciary who must establish the fairness of the transaction. Nevertheless we cannot see that the result would have been different had the hearings proceeded on the theory that defendant had the burden of overcoming the presumption of unfairness, and we think it would be an injustice to submit defendant to another hearing of the same issues, in the light of the facts that plaintiff's proof at the prior hearings failed to establish fraud in the documents introduced and that both the defendant and Kamenjarin, the broker, testified to sustain the transaction.

Since the same person is the defendant in both suits, and since facts are alleged to show he was in a dominant position in both suits, and since the same acts are alleged to be the basis of fraud in both actions, we do not see any substantial disparity between the parties in the two actions.

The basis of the doctrine of res judicata is stated to be that public policy and the interest of litigants require that there be an end to litigation, 30A Am. Jur. Judgments, Sec. 326. To allow plaintiff to maintain substantially the same action against substantially the same party would, in our opinion, serve only to defeat this policy.

Plaintiff contends, in arguing against application of res judicata to this case, that defendant deceived the court in obtaining the prior judgment in his favor. This contention is not supported by anything in the record nor by anything in argument in plaintiff's brief.

We need decide no other points. The court below was correct in holding that the prior judgment is a bar to maintenance of this action and that there was consequently no triable issue of fact. The judgment is affirmed.

AFFIRMED.

LEWE, P.J. AND MURPHY, J., CONCUR.

ABSTRACT ONLY.

175

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47594

22 I.A.2d 177

CHRIS B. SINK,

Plaintiff - Appellee,

GEORGE W. HANSEN,

Counterdefendant - Appellee,

v.

TABERNACLE MISSIONARY BAPTIST CHURCH, a religious Corporation, LOUIS RAWLS and WILLA RAWLS, his wife; et al., etc.,

Defendants-Counterplaintiffs - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to foreclose two trust deeds. After defendants filed an answer and counterclaimed for cancellation and rescission of the deeds and notes, the cause was referred to a Master who took evidence and found in favor of plaintiff and counterdefendant. The court affirmed the order in its entirety and entered a foreclosure decree approving the Master's report. Defendants appeal.

The first loan for $100,000 was made in 1949 and the second for $46,000 in 1951. The interest rate on both loans was six per cent and the loans were secured by trust deeds to defendants' property, which consisted of six lots improved with a church auditorium and other related buildings, having an appraised value of over $400,000. The lenders charged a commission of $10,000 on the first loan and $11,500 on the second.

Although defendant church had received approximately $1,000,000 between 1948 and 1958, it was in default on both loans by October, 1954. Plaintiff, by purchase of counterdefendant's

half interest, acquired full interest in the loans and commenced this action in December, 1954.

Defendants contend that the loans in question were usurious; that they were overreached by plaintiff and counterdefendant because counterdefendant acted as a lender and as borrowers' attorney; and that the decree was contrary to the manifest weight of the evidence.

Corporations are not bound by the usury provisions of the Illinois Interest Act. Ill. Rev. Stat. 1957, ch. 74, §§ 4-5. Since the term "corporation" is in no way qualified or limited, we think the Act must be applied to all corporations in the same fashion. It is admitted that defendant church is an Illinois religious corporation. Therefore, the defense of usury is not available in this action.

An attorney is not prohibited from making loans to his clients. Masters v. Elder, 407 Ill. 512; Masterson v. Wall, 365 Ill. 102. A business transaction between an attorney and his client is valid and enforceable if it was a fair transaction based upon adequate consideration and entered into voluntarily, deliberately, advisedly and with full understanding. Rose v. Frailey, 10 Ill.2d 514. Independent legal advice is not necessary where the dealings are fair and completely within the comprehension of the client. Trafelet v. M & C Motors, Inc., 15 Ill. App.2d 534; see also Zeigler v. Ill. Tr. & Sav. Bk., 245 Ill. 180. In our opinion, charging the client a fee for routine and regular services in connection with such a transaction does not in

itself render the transaction void as long as the above stated requirements of fair dealing are met. Therefore, the fact that counterdefendant was both a lender and borrowers' attorney does not of itself establish that defendants were overreached.

We must now ascertain whether plaintiff and counterdefendant met the previously mentioned standards of fair dealing and whether the decree is supported by the manifest weight of the evidence.

It should be noted that there is no controversy concerning the terms of the loans. Likewise, it is admitted by all parties that counterdefendant had acted as attorney for defendants on numerous occasions and performed legal services in connection with the loans in question as well as being a lender; that a full disclosure of all relevant information was made to defendants; and that defendants received the full amount of the loans less commissions. It is clear that the money received by defendants was adequate consideration for the loan agreements.

Other lenders testified that much higher commissions were usually charged on loans to "Colored Churches"; defendants did not rebut this testimony. We see no error in the Master's and the Chancellor's concluding that the loan agreements here were fair, honest and open transactions.

The remaining question relates to the manifest weight of the evidence. Defendant Rawls, founder and leader of defendant church, is a well educated person holding many degrees.

He has engaged in numerous business ventures, including printing, undertaking, real estate and hotel operation. ~~He also had a real estate broker's license.~~ He has consulted several other attorneys in these various dealings. Rawls made many loans with counterdefendant as well as with other parties. Before the loans in question were made the board of trustees of the church, including a lawyer, gave the matter due consideration.

After a careful examination of the record we are convinced that the decree is supported by the manifest weight of the evidence. The Master and the Chancellor could find on the evidence that the loans were made voluntarily, deliberately, advisedly and with full knowledge. We think the court properly decreed foreclosure.

For the reasons given the decree is affirmed.

AFFIRMED.

MURPHY AND KILEY, JJ. CONCUR.

ABSTRACT ONLY.

122

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47705)
) Consolidated
47720)

47705

W. B. FITZGERALD, Appellee, v. ROBERT PIKE, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

47720

W. B. FITZGERALD, Appellee, v. ROBERT PIKE, Defendant, and RADIANT MANUFACTURING CORPORATION, Garnishee-Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

These consolidated appeals arise out of an attachment suit based on an account stated, to recover the sum of $9,159, allegedly due the plaintiff, W. B. Fitzgerald, from the defendant, Robert Pike. The attachment writ issued January 20, 1958, named Radiant Manufacturing Corporation as a garnishee and specifically attached moneys due Pike from Radiant, for commissions earned by him. The appeals are considered separately.

I.

Defendant Pike's appeal is based entirely on the theory

that Fitzgerald failed to prove the grounds for attachment set forth in his affidavit, and that the attachment writ should have been quashed and the proceedings dismissed.

The attachment affidavit set forth as a ground for the issuance of the writ that Pike was "about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors." A nonjury trial on the issues of attachment resulted in a finding for plaintiff Fitzgerald. The case was then transferred to another trial judge for a trial of the issues of plaintiff's complaint and answer of defendant. After a protracted hearing, judgment was entered against Pike for the sum of $9,159.

The evidence shows that on November 9, 1956, defendant Pike entered into a written agreement with the garnishee, Radiant Manufacturing Corporation, for the sale and distribution of "Regiscopes," a photographic device, which Radiant is licensed to distribute. Pike was to be paid $60 for the sale of each Regiscope, and the agreement was for a period of two years, with the obligation of Radiant to pay fees after the termination of the agreement, until all fees earned were paid in full. The agreement further provided that Pike was to pay all expenses incurred by his organization, but that Radiant would furnish advertising and literature at its expense.

Subsequently, Pike engaged Fitzgerald to assist him in securing sales and distributors, and by a written agreement between them, dated July 9, 1957, Fitzgerald was to receive $10 from Pike for the sale of every Regiscope. Pike became delinquent

in his payments to Fitzgerald, and on December 13, 1957, Fitzgerald's attorney wrote a letter to Radiant, requesting the corporation to hold up Pike's commission until the matter could be amicably adjusted.

In a conference on the afternoon of January 17, 1958, Fitzgerald requested Pike to authorize the garnishee, Radiant, to pay direct to Fitzgerald his proportionate share of future commissions. Pike then went to the office of Radiant's attorneys and later that day told Fitzgerald he would not give such an authorization for future commissions, and that he was going to make a deal for all parties concerned. He admits he did not tell Fitzgerald that after the conference and on that same day, he entered into an agreement with Radiant, terminating his sales agreement with Radiant for the sum of $15,000 and commissions up to January 31, 1958, $2,500 of which was paid to Pike and the balance to be used to pay Pike's creditors listed in a letter attached to the termination agreement. Fitzgerald was not included in the list. On January 18, 1958, Pike flew to California and there re-established a permanent residence.

On January 20, 1958, Fitzgerald filed his affidavit and attachment suit, and on that day interrogatories were served upon Radiant, as garnishee. On January 31, 1958, Radiant filed its answer to the interrogatories and, referring to the termination agreement of January 17, made the general statement that garnishee setoffs and counterclaims against Pike would exceed any sums due Pike.

At the hearing to determine Fitzgerald's right to an attachment, upon the grounds set forth in his affidavit, Fitzgerald testified that in a meeting in his office on January 14, 1958, in the presence of Fitzgerald, his son and his attorney, Pike admitted owing him the sum of $9,159, and in response to a request for payment, said, "You will get paid. If you take it to court, you won't get anything." Pike testified that he did not "remember" the statement. He admitted owing Fitzgerald $9,159, and also admitted the termination agreement with Radiant, and that he did not tell Fitzgerald about it, because "I don't think I hurt Fitzgerald's rights in any way. I owed him money. I don't deny that."

The cases cited by Pike, to support his theory that the proof was insufficient to sustain the attachment affidavit allegations, indicate that "There must be in the transaction the element of intentional fraud. If that element is lacking, or in other words, if the transaction is in good faith, it will furnish no ground for attachment" (Moeller & Kolb v. Van Loo Cigar Co., 180 Ill. App. 435, 439). There must be "a preponderance of the evidence that the conveyances in question were procured * * * with an actual fraudulent intent on his part to hinder and delay his creditors" (Fippinger v. Ullrich, 178 Ill. App. 611, 614), and "fraud is not to be presumed when under the evidence the transaction may be fairly reconciled with honesty" (Dempsey v. Bowen, 25 Ill. App. 192, 194), and "It is 'not enough that the effect of the deed was to delay creditors, but it must have been executed with that purpose and intent'" (Murry Nelson & Co. v. Leiter, 93 Ill. App. 176). Also, that a debtor "may prefer

one creditor to another," if done in good faith (Schroeder v. Walsh, 120 Ill. 403, 411.) (Italics ours.)

Applying the test of "good faith," "honesty" and "purpose and intent," we think the trial court could find that Pike was not acting in "good faith" and that his "purpose and intent" was to "hinder and delay" the payment of his admitted indebtedness to Fitzgerald. The finding was justified on the evidence that Pike avoided attempts by Fitzgerald to secure a direction from Pike to Radiant to pay Fitzgerald; that he went directly to Radiant and signed such a direction for other creditors, not including Fitzgerald, terminated his basic contract with Radiant and immediately left Chicago for the establishment of a permanent residence in California. We believe there is ample evidence in the record to support the finding of the trial court for Fitzgerald on the attachment issue.

II.

The appeal of Radiant Manufacturing Corporation, as garnishee, is from a judgment order entered October 23, 1958, by the second trial judge, wherein the court found the sum of $18,907.10 to be the fund in the hands of the garnishee, Radiant, belonging to defendant Pike, and then entered judgment on behalf of Fitzgerald and five intervening creditors of Pike.

The finding of the court that there was due Pike, from Radiant, the sum of $18,907.10, is based on an admitted indebtedness by Radiant of $14,287.10 and the sum of $4,620, which the court found due Pike as additional commissions. In a statement

prepared by the comptroller of Radiant, showing the number of Regiscopes sold by Pike as of January 29, 1958, seventy-seven were deducted because Radiant had cancelled the sales and refunded payments received, and in the order of October 23, the court found Pike was entitled to a commission of $60 each on these seventy-seven Regiscopes.

Radiant contends the finding as to this additional sum of $4,620 was improper, because there was nothing in the record to show that Pike or his accountant objected to or questioned the deduction of the refunds from his commissions.

The agreement between Pike and Radiant provided: "Fees shall be paid to you within 10 days after Radiant has received payment for each Regiscope purchased." We agree with Radiant that if Pike could not have collected these commissions, his creditors could not, because they stand in exactly the same position in relation to the garnished fund that the judgment debtor does, and creditors can enforce only such rights as the debtor might enforce. (Schmitz v. 75th & Exchange Drug Co., Inc., 303 Ill. App. 192.) It is admitted that the Regiscopes were delivered and payment accepted by Radiant. There is no showing in the record, binding on Pike and, therefore, on his creditors, of any special agreement to relieve Radiant from the application of the rule announced in Coey v. Coey & Co., 150 Ill. App. 296, that the acceptance by Radiant of payment for these sales entitled Pike to his commission. The subsequent cancellation and refund by Radiant could not defeat or affect Pike's right to commissions, in the absence of a special agreement. We think Radiant cannot rely on the absence of any objection by Pike to

avoid liability for commissions on sales for which it made refunds, and that it had the burden of showing a special agreement by Pike to waive these commissions. We conclude the trial court was correct, in the absence of that showing, in finding the additional commissions totalling $4,620 were due Pike, making a total of $18,907.10 as the sum due from the garnishee to defendant.

Radiant's further contentions, that the judgment order of October 23 is erroneous, are directed toward the separate judgments entered on behalf of Pike's intervening creditors and the failure of the court to allow other setoffs.

The garnishee interrogatories, as ultimately answered by Radiant, set forth as setoffs against the garnished fund, twenty-three claims of creditors of Pike. The record indicates that some of these claims were paid by Radiant after being served as garnishee, and contrary to section 21 of the Attachment Act (Ill. Rev. Stat. 1957, ch. 11). A number of these claims were included in Pike's list of creditors attached to the termination agreement of January 17, 1958. On April 9, 1958, pursuant to petition of Radiant, the court directed notice served "upon each of the persons, firms or companies who have made claims and demands against the garnishee, * * * as set forth in the amended answer of the garnishee to plaintiff's interrogatories, which said notice shall have incorporated therein a statement informing said persons, firms or companies to appear at the trial of the within cause on May 1, 1958, * * * and then and there assert all of their claims for the payment of obligations incurred by the defendant, Robert Pike, in the name of Regiscope, a Division of Radiant Manufacturing Corp."

Eight creditors of Pike filed intervening petitions. These intervenors were included in the Pike list of January 17 and in the amended interrogatories answer of Radiant. One intervenor dismissed its petition, and two others offered no proof in behalf of their claims. There was no contest by anyone as to the amounts of the remaining five claims, or that they were due and owing by Pike. However, there was testimony to the effect that three of the claims were direct obligations of Radiant. Radiant contended that these three claims were obligations chargeable to Pike under their original agreement. In the final judgment order of October 23, 1958, the trial court disposed of the claims of the five intervenors without making any finding as to the claims of the Pike creditors on which no intervening petitions were filed, and on which no evidence was offered by anyone, including Radiant, except testimony as to several claims paid after the service of the garnishee interrogatories and summons. The court entered judgment for the remaining five intervenors. Two judgments were entered in the name of defendant Pike for the use of the named intervenors, and three judgments were entered against Radiant direct.

We agree with the contention of Radiant that the two use judgments, as entered, are improper. No judgment was entered directly against Pike prior to the entry of the use judgment. In an attachment proceeding, the court must acquire jurisdiction over the defendant and proceed to render judgment against him, before it pronounces judgment against a party who is summoned as a garnishee. Iroquois Furnace Co. v. Wilkin Manf. Co., 181 Ill. 582, 590.

In the instant case, the claims of these two intervenors were proper charges against the funds in the hands of the garnishee, and the court did have jurisdiction over the defendant, Pike, and, therefore, should have rendered judgment against him for each of the intervenors before entering the use judgments against the garnishee, Radiant.

As to the three separate judgments entered directly against the garnishee, there is no dispute by the garnishee, Radiant, that these were not proper claims, payable out of the funds due Pike, and the evidence in the record was sufficient to have warranted the court in entering direct judgments against Pike. Therefore, and without determining the right of an intervenor to obtain a judgment directly against a garnishee, we believe the trial court, in this case, properly should have entered a judgment for these intervenors directly against Pike, and then entered use judgments against the garnishee.

As the record conclusively shows that these five intervenors were creditors of Pike and were entitled to be paid out of funds in the hands of the garnishee, Radiant, belonging to the defendant, Pike, we believe that pursuant to the authority given to this court in section 92 (1) (e) of the Civil Practice Act (Ill. Rev. Stat.1957, ch. 110); 3 I.L.P., Appeal and Error, §931, proper judgments should be entered here.

Therefore, in accordance with the conclusions of this court, it is ordered and adjudged that a judgment be and it is hereby entered against Robert Pike, defendant, for Larson Calculating and Typing Service, Inc., in the amount of $1,925.96 and costs; for Herman Dykema, d/b/a Madison Accounting Service, in the amount of $1,749.25 and costs; for Glader Corporation in

the amount of $499.36 and costs; for D & L Office Furniture Company in the amount of $803.77 and costs; and for Robert Wurman, Sonia Simon and Janis Gagnon, d/b/a Boulevard Employment Service, in the amount of $288 and costs; and it is further ordered and adjudged that judgment be and it is hereby entered in the name of Robert Pike, and against Radiant Manufacturing Corporation, as garnishee, for the use of Larson Calculating and Typing Service, Inc., in the amount of $1,925.96 and costs; for the use of Herman Dykema, d/b/a Madison Accounting Service, in the amount of $1,749.25 and costs; for the use of Glader Corporation in the amount of $499.36 and costs; for the use of D & L Office Furniture Company in the amount of $803.77 and costs; and for the use of Robert Wurman, Sonia Simon and Janis Gagnon, d/b/a Boulevard Employment Service, in the amount of $288 and costs.

The judgment order of October 23, 1958, makes no disposition of the remaining setoffs claimed by Radiant in its various pleadings. The presumption is that the court rejected them as proper setoffs. This was correct. These creditors did not present their claims in these proceedings when so directed, and Radiant offered no evidence in lieu thereof to warrant the court finding them to be proper setoffs.

Therefore, this court concludes that the order of the trial court sustaining the issuance of the writ of attachment should be and it is hereby affirmed, and that the judgment order of October 23, 1958, except as herein modified by the judgments being entered by this court for five intervening creditors, should be and it is hereby affirmed.

AFFIRMED AS MODIFIED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

MAY TERM, A. D. 1959

PAUL V. WENGER

MARY E. KASBEER, Plaintiff-Appellee, -vs- JAMES V. KASBEER, Defendant-Appellant.	Appeal from the Circuit Court of Bureau County. 2nd DIV

CROW, J.

This is an appeal by the defendant, James V. Kasbeer, from a final order of the Circuit Court of Bureau County, Judge Ryan, presiding, entered on October 15, 1958, directing the defendant to pay to Mary E. Kasbeer, the plaintiff-appellee, his former wife, the sum of $400.00 in full for back maintenance and support of their three minor children, and, further, to pay $35.00 per week thereafter for the support of the children. The order was entered subsequent to a petition of the plaintiff, Mary E. Kasbeer, filed September 30, 1958 for a rule on the defendant, James V. Kasbeer, to show cause why he should not be held in contempt for failure to comply with the original decree of divorce of June 5, 1952, as subsequently modified February 20, 1953, which decree, as so modified, required a payment of $45.00 per week, it being alleged the defendant was then delinquent in a total amount of $1185.00. An order was entered

thereon directing the defendant to appear and show cause, and he filed a motion to dismiss this petition on the grounds, in substance, that the issues had been previously adjudicated by the Circuit Court, Judge Dixon presiding, in an order of September 25, 1958 on a prior petition of the plaintiff filed September 16, 1958 to modify the decree, which prior petition had asked that the defendant be required to pay a sum which, with what he had in fact paid since June 1, 1957, $120.00 per month, would equal $45.00 per week for the period June 1, 1957 to date, and that he pay $50.00 per week in the future, and which order of September 25, 1958 had found the allegations of that prior petition not proven and had denied the prayer thereof. From the record we find that apparently no disposition was ever made of this motion of the defendant to dismiss. Then later, on October 15, 1958, the defendant filed a petition to modify the decree, as previously modified, so as to require him to pay $120.00 per month in the future and to order that the $120.00 per month he had actually paid since February, 1957 was in full of all he owed from then to the present time, the defendant in this petition making no mention of his prior motion to dismiss or Judge Dixon's prior order of September 25, 1958 or the plaintiff's prior petition of September 16, 1958, and alleging, inter alia, that by agreement in February, 1957, his payments were reduced to $120.00 per month for a limited time, at the end of which time a further hearing was to be held but was not held, that he has in fact paid $120.00 per month from February, 1957 to date, that since February 20, 1953, when the decree was modified to $45.00 per week, his pres-

ent wife is not now employed, they have a minor child, his net earnings have decreased, the plaintiff is employed and earns about $65.00 per week, she has gross rentals of $140.00 per month from a house, he has had a permanent and partially disabling injury, has certain medical expenses, has certain added labor costs in his business, cannot pay $45.00 per week, and cannot pay more than the $120.00 per month he's been in fact paying. On the same day, October 15, 1958, the order appealed from was entered, the order reciting in paragraph 2 thereof as follows:

> "That the parties have heretofore, in open court, agreed and stipulated that this cause should be heard upon the question of the modification of the decree of divorce heretofore entered herein in regard to the payment of child support, and that this Court should determine the needs of the plaintiff's children and the ability of the defendant to pay."

On June 5, 1952, the plaintiff had obtained the original decree of divorce, the decree, pursuant to an agreement of the parties, awarding her the care and custody of the three minor children, then of the ages of nine years, three years, and ten months, subject to reasonable visitation rights, and ordering the defendant to pay $35.00 per week for the support of the plaintiff and the three children. This decree was subsequently modified by the order of February 20, 1953, on petition of the plaintiff, to set the amount at $45.00 per week to be paid by the defendant thereafter for the support of the plaintiff and the three children.

At the last hearing on modification the plaintiff testified that she is earning about $ 65.00 gross per week, considering overtime; she owns her own home, subject to a mortgage of $5500.00; she has $140.00 per month gross rentals from another property but in the last few years it has practically shown a loss because of repairs and upkeep; there was an informal, oral

agreement in March or February, 1957 under which the defendant paid up all then delinquencies in the support payments, was to pay $120.00 per month then for a while and has, in fact, done so since March 1, 1957; the defendant formerly paid $45.00 per week from 1953 until his delinquencies in 1957; $120.00 per month is insufficient to feed and clothe the three minor children who are now all in school and are now, respectively, 16, 10, and 7 years old; $15.00 to $16.00 per week is the cost per child; and the defendant has not contributed to her or the children's medical expenses.

The defendant testified that he is in the tavern business and that his net income is from $3,000.00 to $3,600.00 per year from that, and, in addition, he has $300.00 a year from an inheritance; he said his net income from the business is less than in 1952 and 1953, but he cannot state what the business income was in 1952 and he did not testify what it was in 1953, or in any succeeding year; his gross sales have not decreased since 1956, but expenses have mounted, though he has no idea of how much in dollars; his original business investment was $6,000.00, but he does not know how much he's added or its present value; by reason of an injury in 1953 he has become partly incapacitated and forced to hire help at the tavern at the rate of $15.00 per week; he has medical expenses because of his injury in approximately the sum of $25.00 per month; he has a wife now and they have one child four years old, and his wife is not now employed; he owns a home costing $9,600.00 on which there is presently a mortgage of $4,500.00 on which he pays $100.00 per month; he owns a 1957 Oldsmobile and owes $1300.00 - $1400.00 on it; he has a substantial interest in a $25,000.00 mortgage in-

vestment; he has been paying the plaintiff $120.00 per month since February, 1957 and says he cannot pay more, and he thought the informal, verbal reduction to $120.00 per month in 1957 was to continue until later modified; and he knows it is difficult to keep the children on $45.00 per week.

The defendant urges two grounds for reversal, namely, (1) that the order to pay $400.00 for back support should not have been entered because the issues had been adjudicated by Judge Dixon's former order; and (2) that the order to pay $35.00 per week is not supported by the evidence, but on the contrary is so grossly excessive and inequitable as to amount to an abuse of discretion on the part of the trial court.

We can see no merit in the first contention. The defendant, by later agreeing and stipulating that the Court might hear the case upon the question of the modification of the decree, as modified, in regard to the payment of child support and should determine the needs of the children and the ability of the defendant to pay, and by later filing his own petition to modify the decree, making no reference therein to his former motion to dismiss, the prior order of September 25, 1958, or the prior plaintiff's petition, waived any right to be heard on his prior motion to dismiss the plaintiff's prior petition and acquiesced in the Court's proceeding as it did to determine the merits of the modification requested by the defendant. He cannot now urge in the Appellate Court a point concerning claimed res judicata which he apparently did not press in the trial court. Upon familiar principles, a party cannot try his case on one theory in the trial court and on an entirely different theory in the Appellate Court: PEOPLE ex rel LUNN v. C. T. and T. CO. et al.

(1951) 409 Ill. 505; IN RE ESTATE OF LEICHTENBERG (1956) 7 Ill. (2) 545; HUMSLEY et al. v. AULL et al. (1944) 387 Ill. 520; WILLIAMS v. HINDBLOM et al. (1896) 163 Ill. 346; INLET SWAMP DRAINAGE DIST. v. ANDERSON et al. (1913) 257 Ill. 214; C.R.I. and P. RY. CO. v. TOWN etc. (1894) 151 Ill. 512. We might also observe that, apparently as a further part of the somewhat informal procedure adopted by the parties here, the plaintiff has apparently also acquiesced in the Court's proceeding as it did to determine the merits of the requested modification, and did not, evidently, press any claim for relief by way of contempt against the defendant for alleged past delinquencies, and she must be considered, under the circumstances, as having waived that particular possible form of relief. By agreement and stipulation parties may submit a justiciable issue such as the requested modification here involved.

The order of modification of February 20, 1953 directed the defendant to pay $45.00 per week for the support of the plaintiff and the three children. That order has never been changed, so far as the record appears, until the present order of October 15, 1958. As of about March 1, 1957 apparently the defendant was somewhat delinquent but those delinquencies were then paid up. From about then to, presumably, the date of the present order, October 15, 1958, the defendant has in fact actually paid $120.00 per month, and the plaintiff has accepted that amount, without evidence of any objections or protest, and without calling the matter to the Court's attention upon a petition for citation, or otherwise, until the proceedings of September, 1958 heretofore stated. No orders were entered or other proceedings of record had in 1957. Both parties testified to some supposed oral understandings in 1957 but there was no written

evidence or record thereof and the matter was left in such a nebulous state that we cannot perceive there was then any real meeting of the minds or agreement, much less any approval by the Court of any proposed changes. To whatever extent the $45.00 per week stated in the order of February 20, 1953 was alimony for the support of the plaintiff she probably could, and we think did, from March 1, 1957 waive and release it by accepting the lesser $120.00 per month from then to as of October 15, 1958, without objection or protest or calling the subject to the Court's attention, - at any rate she is not appealing from the present order and is bound by its terms so far as it settles and adjudicates, by the $400.00 judgment, any prior delinquencies, if any, in alimony (or child support). But to whatever extent that $45.00 per week was child support for the support of the children she had no authority to waive and release it in whole or in part from March 1, 1957, without at least a proper order of Court authorizing such, and we think she did not so waive and release it in whole or in part by so accepting the lesser $120.00 per month payments. It appears from the record and abstract of the trial court's comments, - though such is not specifically stated in the order itself of October 15, 1958, - that, in the absence of some other or better suggestion from the parties, the Court considered that since the $45.00 per week was for the support of 4 people, - the plaintiff and 3 children, - one-fourth, or $11.25, per week would for this purpose be considered as alimony for the support of the plaintiff, and three-fourths, or $33.75, per week, would for this purpose be considered as child support for the children. The $120.00 per month actually paid

by the defendant from about March 1, 1957 to as of October 15, 1958 is about $30.00, or somewhat less, per week. Crediting that on the $33.75 per week due for child support, under these circumstances, under the order of February 20, 1953, leaves a deficiency in child support of about $3.75, or somewhat more, per week, - or about $15.00, or somewhat more, per month. In the absence of any better suggestion from the parties, the Court rounded that estimated deficiency off to $20.00 per month, which, for the 19½ months from March 1, 1957 to October 15, 1958, is about $390.00, which was finalized to an estimated deficiency in child support of $400.00 as of October 15, 1958, and that is the reason and computation, as we understand it, for the $400.00 judgment included in the present order. Such is within the scope of the evidence and its reasonable inferences and intendments, and, under the circumstances, we are not disposed to disagree with the trial court's analysis, estimates, and computation.

As to his second contention, the defendant takes the position, principally, that the plaintiff's income of $65.00 gross per week should be combined with the income of the defendant, which is about $3,900.00 per year, in determining how much he should pay for support of the minor children. This position is untenable. The order appealed from orders him to pay $35.00 per week solely for and on behalf of the children, - child support only. He is not ordered by this order to pay anything for the support of his former wife, - alimony. However valid, in a proper case, may be the principle the defendant urges of combining the income of the wife, where she has an income, and the income of the husband, considering what should be allowed from that aggregate for her support, deducting from such sum her income,

and considering the remainder as her proper allowance to be paid by him, in determining alimony only for the support of the wife, the principle has no application as such under these circumstances in determining, as this order does, only child support for the minor children. CAHILL v. CAHILL et al. (1942) 316 Ill. App. 324 and DECKER v. DECKER (1917) 279 Ill. 300, referred to by the defendant, and GILBERT v. GILBERT (1922) 305 Ill. 216, another case involving that matter, all concerned only alimony for the support only of the wife, and not child support. Although the mother is also, next responsible, so far as the children are concerned, for their support, the primary liability for child support rests on the defendant father. The obligation of the father to support his children begins when the child is born and continues during the minority of the child, and is not affected by a divorce decree or the provisions of such decree granting the care and custody of the child to his former wife: KELLEY v. KELLEY (1925) 317 Ill. 104; STEELE v. PEOPLE (1899) 88 Ill. App. 186. Alimony for the support of the former wife, and child support for the support of the children are distinct and separate things, and the fact that the divorce decree gives the care and custody of the children to the mother does not impose upon her the burden of their support or release the father from that duty: KONITZER vs. KONITZER (1904) 112 Ill. App. 326; PLASTER v. PLASTER (1868) 47 Ill. 290.

We also note that the defendant, in effect, admits that $120.00 per month is reasonable, that he can pay that sum, and has in fact been paying it. In fact, he paid $45.00 per week for some time after the February 20, 1953 modification. The

original $35.00 per week figure determined in the original decree of June 5, 1952 was by agreement of the parties, and presumably the defendant himself considered it reasonable, in accordance with the needs of the recipients, and within his ability to pay, under the then circumstances. There is nothing to indicate the needs of the children are any less as of October 15, 1958 than as of June 5, 1952 or February 20, 1953, - in fact, the natural inference from the evidence as to their ages and positions in school would indicate their needs are probably more. Yet the order of October 15, 1958 sets the figure to be paid by the defendant for child support at $35.00 per week, - the same as did the decree of June 5, 1952 and $10.00 per week less than did the modification order of February 20, 1953. The $120.00 per month figure the defendant asks is about $30.00 per week, - or only $5.00 per week less than is set in the order of October 15, 1958. The $35.00 per week set in that order is only about $5.00 per week more than the $120.00 per month actually paid since early 1957, and, so far as the orders in the record are concerned, it is $10.00 per week less than the $45.00 per week set in the February 20, 1953 modification order with which the defendant was apparently able to comply and did comply for several years. Disregarding the unsupported conclusions and opinions in the defendant's testimony, there is no substantial evidence his net income is materially less in 1958 than in 1952 or 1953, and considering the properties he has, the other substantial obligations he is evidently able to undertake and to keep up, and the reasonable inferences therefrom, he would seem financially able to pay at least what is ordered here for child support, and some of the alleged changes of circumstances

he urges, though changes, are not legally significant changes as related to the children's needs or his obligation and ability to support the children. Under CH. 40 ILL. REV. STATS., 1957, par. 19, "when a divorce shall be decreed, the Court may make such order touching the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just" - - and - - "The Court may, on application, from time to time, make such alterations in the care, custody and support of the children, as shall appear reasonable and proper." The Court may alter the allowance required of the defendant father as to support of the children as the necessities of the children and the ability of the father may require, the welfare of the children being the controlling consideration, but the defendant father here seeking a modification had the burden of establishing by proper and sufficient evidence the material changes in conditions and circumstances relating to the children's needs or his ability to pay which would justify a modification: 16 ILL. LAW and PRACT., p. 392 - 394; GOODMAN v. GOODMAN (1946) 329 Ill. App. 444. The defendant says his complaint on this appeal concerns the amount of the modification, - that there should have been a reduction of more than $10.00 per week from the February 20, 1953 modification order. We think it clear he has not satisfied the burden of proof to justify any greater modification than is made by the present order.

Considering all this evidence, and the reasonable inferences therefrom, and the law, we cannot believe the order is clearly against the manifest weight of the evidence. The trial court has a rather broad discretion in such matters, and a court

of review will not reverse the finding relating to child support unless that finding is clearly against the manifest weight of the evidence or the law: WADE v. WADE (1951) 345 Ill. App. 170; SCHMIDT v. SCHMIDT (1952) 346 Ill. App. 436; the judicial discretion of the trial court as to matters relating to child support should not be disturbed unless manifest injustice has been done, and there was here no abuse of discretion: BATEMAN v. BATEMAN (1949) 337 Ill. App. 7; 16 ILL. LAW and PRAC., p. 395, 6.

The order will therefore be affirmed.

AFFIRMED.

Wright, P. J. Concurs

Wright, P. J. Conours

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Abstract

General No. 11234 Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

February Term A.D. 1959

1st DIVISION

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J. PAUL MASTERS and SUSAN T. MASTERS, Plaintiffs-Appellees, vs. CENTRAL ILLINOIS ELECTRIC and GAS COMPANY, a Corporation, AUBREY J. GREGORY and HILLER T. ANDERSON, partners d/b/a Gregory Excavating Company, Defendants, CENTRAL ILLINOIS ELECTRIC and GAS COMPANY, a Corporation, Appellant.	APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY.

DOVE, J.

By the complaint in this cause the plaintiffs, J. Paul Masters and Susan T. Masters, husband and wife, sought to recover damages sustained by them when their dwelling house, then under construction but almost completed, was, on May 22, 1954, virtually destroyed as the result of a gas explosion, caused by a flow of gas released when the gas service pipe to the dwelling was separated from the meter.

The complaint consisted of four counts. The Central Illinois Electric and Gas Company is the defendant in Count One. Count Two sought a recovery against Aubrey J. Gregory

and Hilmer T. Anderson, partners, doing business as Gregory Excavating Company. By Count Three the plaintiffs sought a judgment against Frank Wojcik and A. J. Wojcik, partners doing business as the Wojcik Construction Company, the contractors, who were engaged to construct the home. Count Four sought a recovery against A. Reyner Eastman the architect of the dwelling.

The issues made by the pleadings have been submitted to four juries. At the conclusion of the plaintiff's evidence at the first trial, the court directed verdicts in favor of A. Reyner Eastman, the architect, and in favor of the Wojcik Construction Company, the contractors, defendants respectively in Counts Three and Four. At the conclusion of all the evidence the jury returned verdicts finding the defendant, Central Illinois Electric and Gas Company, defendant in Count One, guilty and found the defendant in Count Two, the Gregory Excavating Company not guilty. On plaintiff's motion the trial court granted plaintiff a new trial as to the Gregory Excavating Company and sustained the motion of the Electric and Gas Company for judgment notwithstanding the verdict and in the alternative granted its motion for a new trial. This court denied the petition of the Gregory Excavating Company for leave to appeal from the order of the trial court granting plaintiff's motion for a new trial as to this defendant and affirmed the judgments of the trial court rendered on Counts Three and Four. This court, however, reversed the judgment of the trial court rendered in favor of the Central Illinois Electric and Gas Company, defendant in Count One, notwithstanding the verdict, and remanded the cause for a new trial. (Masters v. Central Illinois Electric and Gas Company, 7 Ill. App. 2d, 348.)

Upon the second trial the jury disagreed. The third trial resulted in verdicts of not guilty in favor of the defendant, Central Illinois Electric and Gas Company, defendant in Count One, and also in favor of the defendant, Gregory Excavating Company, defendant in Count Two. Judgments were rendered on those verdicts and the record of that trial was reviewed by this court and without expressing any opinion as to the weight of the evidence both judgments were reversed and a new trial ordered. (Masters v. Central Illinois Electric and Gas Co., 15 Ill. App. 2d, 95.)

Upon the fourth trial the jury returned a verdict finding the defendant in Count Two, Gregory and Anderson, (the Excavating Company) not guilty and found the Central Illinois Electric and Gas Company, defendant in Count One, guilty and assessed plaintiffs' damages at $41,120.40. Upon the appeal of the Central Illinois Electric and Gas Company the judgment of the trial court rendered on this verdict is before us for review.

Counsel for appellant insists that there is no evidence in this record that any of the employees of appellant acted otherwise than as ordinarily careful and prudent men would have acted under the circumstances and therefor the judgment appealed from cannot stand as it is unsupported by any evidence. In this connection counsel call our attention to the fact that upon the first appeal we sustained the action of the trial court granting the Gas Company a new trial. The evidence in this record is substantially the same as the evidence on the first appeal and need not be repeated. In holding that the trial court erred in rendering judgment for the Gas Company notwithstanding the verdict in favor of the plaintiffs, we

said: (Masters v. Central Illinois Electric and Gas Company, 7 Ill. App. 2d, 348, 358) "Taking the evidence in the light most favorable to the plaintiffs in this case, it must have been obvious to the defendant gas company that grading would have to be done to correct conditions and that the grading operation would involve a substantial lowering of the grade. The gas company foreman was an experienced man in these installations, and it is undisputed that Frank Wojcik told him on the day of the installation of the gas pipe that there was to be a grading down of the slope, and then up at the house, and to put the pipe deep enough. The gas company employees did not ask what the grading was to be, did not inquire concerning the plan for final grading, and did not request to see the topographical map at the time the pipe was installed. Even without the other elements of notice, the gas company employees should have known by looking at the level of the front portion of the house that the pipe would be on top of the ground when grading was done. As the gas line approached within a few feet of the house, it dipped sharply down in order to enter the basement at a point only 2½ feet below the ground level. This should have been an indication to the gas company employees that they were not deep enough."

Further on in the same opinion it was said: "The question of negligence of the defendant was a matter for the jury to pass on. The record here presents sufficient evidence to go to the jury and we are of the opinion that the motion for judgment notwithstanding the verdict was improperly granted and that the court erred in entering judgment against plaintiffs and in ordering that plaintiffs take nothing by their suit against defendant, Central Illinois Electric and Gas Company, a Corporation."

Appellant's counsel concede that our previous holdings are to the effect that there was sufficient evidence in the record requiring the submission of the question of defendant's negligence to the jury. Nevertheless, says counsel: "It is the position of appellant that in so holding, this court was in error. Appellant's position is bottomed on the conviction that there was and is no evidence in the record which, with its fair and reasonable inferences, tended to support the charge of negligence in the complaint." We disagree and adhere to our previous holding and conclude that the verdict of the jury is not manifestly against the weight of the evidence, but is supported by the evidence and the judgment of the trial court rendered thereon should not be disturbed.

It is next insisted by counsel for appellant that plaintiffs were guilty of such contributory negligence that no recovery can be had. In their argument counsel state that Mr. Masters was a successful businessman and knew the nature, type and extent of the proposed grading of the yard and must have understood the consequences of disturbing the service line which appellant had installed. "He knew," continues counsel, "that a topographical map showing this in detail had been prepared. He knew that an architect, presumably skilled, was to be in charge of the work with full knowledge of all details. Yet, knowing all of this, he gave no intimation to the representative of defendant at the time of his request for service that anything other than routine problems were to be involved." Counsel insist that when Mr. Masters called appellant and requested the installation of the gas service he failed to inform appellant of what counsel term were extraordinary conditions there prevailing and gave no intimation to any of appellant's

employees or representatives that anything other than routine problems would be encountered or involved. Counsel now insist that Mr. Master's failure to inform the employees of these unusual conditions precludes a recovery.

Other than directing appellant to proceed with the installation of this gas service, appellees had nothing to do with its installation. The superintendent of appellant's service division testified that the service crew of appellant installed this service. Counsel for appellant recognized that its defense of contributory negligence was a jury question and by the twelfth given instruction, tendered by appellant, the jury was instructed that the plaintiffs "must also prove by a preponderance of the evidence that they, the plaintiffs, were not guilty of contributory negligence proximately causing, in whole or in part, the explosion in question." The jury, by its verdict, found plaintiffs were in the exercise of due care and we are unable to say that this finding is not sustained by the evidence found in this record.

It is also insisted that Mr. Eastman, the architect, had knowledge of the nature and extent of the grading and knew of the presence of the gas service pipes in the yard and as agent of the plaintiffs had supervision of this grading for them and therefore any negligence on his part was attributable to the plaintiffs. The record discloses that Mr. Eastman was on the premises on the afternoon the explosion occurred and observed the grading being done by Mr. Ware, an employee of the Excavating Company. Mr. Eastman testified that he told Mr. Ware, at that time, that "he (Mr. Ware) had proceeded quite a ways with the grading," and that then Mr. Ware inquired: "What do you think of it?" and, Eastman replied that it looked quite

good but he could not approve it without an instrument and that he would check the grades on the Monday following. Mr. Ware's version of this conversation was that he, Ware, asked Eastman if the grade looked about the way he thought it should and that Eastman said that generally the grade was all right. Mr. Ware further testified that he and Mr. Eastman agreed that at the foot of the terrace the earth was approximately six inches too high and that Eastman asked Ware if he had anything to check grading with and that Ware told him he had a string level and that he could get pretty close with it. It is appellant's contention that it was Eastman's duty to at least inform Ware of the presence of the gas service and as Eastman and Ware had agreed that the grade was approximately six inches too high at the foot of the terrace and should be taken down that much at that point, that therefore the last six-inch cut was done by Ware pursuant to this understanding with Eastman and that it was while this work was being done that the service pipe was uncovered and struck resulting in the explosion.

Upon the first trial the court directed a verdict in favor of Mr. Eastman and judgment was rendered thereon and that judgment was affirmed. (Masters v. Central Illinois Electric and Gas Co., 7 Ill. App. 2d 348.) In the course of the opinion in that appeal we said that the relationship between the plaintiff and Eastman was contractual and enumerated the contract documents wherein it was stated that the architect was agent of the owner only to the extent provided in the documents. Our opinion noted that the gas pipe or line did not appear on any of the plans, maps or specifications prepared by Eastman and held that the evidence disclosed that Eastman violated no

duty which he owed the plaintiffs or anyone in connection with the installation of the gas service.

In our second opinion (Masters v. Central Illinois Electric and Gas Co., 15 Ill. App. 2d 95, 103, 104 we said: "Whether or not the Architect or Construction Company had any legal duty to the plaintiffs or were guilty of any negligence were questions material to the determination of liability on the first trial. On these material questions the trial court directed the jury to find the architect and the Construction Company not guilty at the close of the plaintiff's case and after denying their motion for a new trial, entered judgment that said defendants go hence without day. This action by the trial court involved the merits of the case and constituted a final adjudication that such defendants were not guilty of any negligence subject only to appeal."

Upon the second appeal, counsel for the Gas Company contended that our adjudication upon the first appeal that Eastman was not negligent was limited to the record as it existed at the end of plaintiffs' case on the first appeal. In holding otherwise, this court said (Masters v. Central Illinois Electric and Gas Co., 15 Ill. App. 2d 95, 103): "It seems to us that the record conclusively shows that there was identity of the parties and causes of action upon the two trials; that a controlling fact or question material to the determination of both cases was adjudicated on the first trial; that since it had been finally adjudicated upon the first trial and affirmed on appeal that the architect and the Construction Company were not guilty of any negligence which proximately caused the explosion, such adjudication was conclusive upon the question of plaintiffs' contributory negligence derived through any negligence on the

part of either of those defendants; that upon the third trial plaintiffs were entitled to the benefits of the adjudication on the former trial and the former judgment was binding and conclusive upon all parties to the record including the defendant Gas Company and Excavating Company and we so hold".

Upon the first appeal we found that there was no evidence showing that Eastman violated any duty which he owed the plaintiff and concluded that the trial court properly directed a verdict as to him. Upon the second appeal we held that the judgment rendered in Eastman's favor was binding and conclusive against appellant and all other parties to the record. Upon the present appeal counsel for appellant insist that our former decisions were erroneous and should not be adhered to stating that "by no stretch of the imagination could appellant be held to be a party to those former judgments and be bound thereby". And in this connection counsel particularly complain of the action of the trial court in giving an instruction which told the jury "that the question of negligence on the part of A. Reyner Eastman, the architect, or Frank Wojcik and A. F. Wojcik, partners, doing business as Wojcik Construction Company, the general contractor, is not in issue in this case for any purpose, and such matter shall not be considered by you in determining whether or not there is contributory negligence on the part of the plaintiffs, J. Paul Masters and Susan T. Masters".

Counsel state that the giving of this instruction "effectively and finally removed from the consideration of the jury any and every question as to the negligence of Eastman as

architect and as the agent of the plaintiffs". What we said in our former opinion (Masters v. Central Illinois Electric and Gas Company, 15 Ill. App. 2d, 95, 103,104) warranted the giving of this instruction.

Appellant is again making the same arguments as were presented when the case was previously before this court. The parties are the same and, as has been frequently stated, whether the situation be designated as res adjudicita or as the law of the case appellant has no standing to again litigate these questions. In our opinion the trial court correctly interpreted our former holdings and the instruction complained of was proper and states the law as previously enunciated by this court.

Appellant also complains of instructions 7, 8, 9 and 15 tendered by appellant and refused by the court. We have considered these instructions and the arguments made together with the suggestions of counsel in connection therewith. We find no error in this record requiring a reversal of this judgment. This litigation has been pending for years. It is high time that it should terminate. (In re: Estate of Blyman, 382 Ill. 520,528).

The judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

SPIVEY, P.J. DOUGLAS

McNEAL, J. DOUGLAS

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Abstract

General No. 11287 (Abstract) Agenda 3

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(First Division)
MAY TERM, A. D. 1959

1st DIVISION

FILED
AUG 28 1959
PAUL V. WUNDER
Clerk Appellate Court Second District

ANN C. SHAW, Plaintiff-Appellee, vs. RALPH BENNETT, d/b/a McHenry Heating and Air Conditioning--and HERMAN GERTZ, Defendant-Appellant.	Appealed from the Circuit Court of McHenry County, Illinois

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SPIVEY--P. J.

This appeal lies from an order of the Circuit Court of McHenry County, allowing appellee's motion to quash a writ of certiorari previously issued by that court to a justice of the peace.

Herman E. Gertz filed a petition for writ of certi orari and alleged that he, together with Ralph Bennett, had been sued in a Justice of the Peace court by the appellee, Ann C Shaw. Ann C. Shaw asked judgment in the amount of One Thousand Dollars against both defendants for damages to her property on account of defective workmanship. Summons, which was returnable May 7, 1958, was properly served upon both defendants

The petition further alleges that the justice's transcript, which was attached as an exhibit to the petition, disclosed that on May 7, 1958, the defendant Gertz failed to appear and on plaintiff's motion was defaulted and judgment entered against him in the amount of One Thousand Dollars in favor of the plaintiff Shaw. According to the petition, the transcript further stated that on the same day the defendant Bennett appeared by his counsel and secured a continuance to May 21, 1958, that on May 21, 1958, the case was heard and taken under advisement and on May 28, 1958, by stipulation between the plaintiff and the defendant Bennett, the case was dismissed as to Bennett, that execution issued against Gertz on June 11th, was served on Gertz on June 28, 1958, and was alleged to be the first notice to Gertz of the judgment on May 7, 1958

The petition states as a fact that petitioner made inquiry regarding the hearing on the matter and was informed that the cause had been continued until May 21, 1958, and that the cause was in fact continued to May 21, 1958, as to both defendants. Petitioner alleges as a fact that judgment was not entered against the Petitioner on May 7, 1958, and states that on that date, counsel for Bennett advised the Justice of the Peace that he would assert a counterclaim against the plaintiff Shaw. On May 21, 1958, the plaintiff appeared in the justice court by Spencer J. Shaw, the defendant Bennett appeared by his attorney, and defendant Gertz appeared in person and a full and complete hearing was had resulting in a judgment against the plaintiff Shaw on the counterclaim of Bennett The petition alleges as a fact that the justice of the peace did not take the cause under advisement.

The petition further states on information and belief that before June 11, 1958, the transcript of the justice was prepared by Spencer J. Shaw, not wholly from the justice's information and memorandum of transactions, but from Shaw's own recollection of the case.

The petition concluded that "he was not at the time of the commencement of said action as aforesaid, nor is he now in any manner indebted to the said Ann C. Shaw, that he has a good and meritorious defense to any action said Ann C. Shaw may have, and that the said alleged Judgment is, therefore, wholly unjust and fraudulent."

Appellant contends that the trial court erred in granting plaintiff's motion to quash the writ of certiorari issued herein and erred in entering an order quashing the writ. Appellant states that the judgment entered against him was not the result of his negligence and that certiorari is a proper proceeding where one has had no opportunity to appeal in the ordinary way. He states that a motion to quash admits all the allegations in the petition and that the issuance of a writ of certiorari is discretionary with the court.

While it is true, as appellant states, the allegations for a petition for writ of certiorari must be taken as true, Stansck v. Slovene National Benefit Society, 279 Ill. App. 204, yet it is equally true that the petition may not be phrased in opinions or conclusions but must set forth and show facts so as to permit the court to draw the conclusions therefrom. Horrell v. Horrell, 52 Ill. App. 477, cited in Auman v. J. Hungerford Smith Co., 344 Ill. App. 395, 100 N.E. 2d. 797.

The entries on the docket of a justice of the peace import verity to the same degree as the records of any court

The petition further charges conspiracy [illegible] that before June 1, 1958, the transcript of the proceedings was prepared by Bunnell & Shaw, not exhibit from the purchaser [illegible] formation and memorandum of [illegible] from which [illegible] reconstruction of the case.

The petition [illegible] of the course pursued [illegible] in [illegible] good and meritorious defense to [illegible] have, and that the [illegible] unjust and fraudulent.

Appellant contends that the trial court [illegible] granting plaintiff's motion [illegible] based thereon and caused in entering a [illegible] Appellant states that the judgment [illegible] the result of his negligence and that [illegible] proceeding wherein one has had no opportunity to appear in the ordinary way. He states that a motion to [illegible] all of allegations in the petition and that the issuance of a writ of certiorari is discretionary with the court.

While it is true, as appellant argues, the allegations for a petition for writ of certiorari must be taken as true, Stanosek v. Slovene Mutual Benefit Society, 275 Ill. App. 204, yet it is equally true that the petition may not be pursued in opinions or conclusions but must set forth and show facts so as to permit the court to draw the conclusions therefrom. Burrell v. Horrell, 32 Ill. App. 477, cited in Lewis v. I. Thorpe and Smith Co., 344 Ill. App. 395, 100 N.E. 2d 791.

The entries on the docket of a justice of the peace import verity to the same degree as the records of any court

commonly designated as a court of record. Downey v. People, 117 Ill. App. 591 It was said in Dayton Scales Co v. Phelps, 259 Ill. App 43, "To impeach the facts as set forth in this transcript the evidence must satisfactorily show that such facts are false. Every presumption in favor of the truth of this record is indulged in, and should not be set aside on the uncorroborated affidavit of the petitioner (Kochman v O'Neill, 202 Ill. 110, 112)"

The invalidity alone of a justice's judgment is not ground for issuing a writ of certiorari Wabash Railroad Company v. Hornbuckle, 131 Ill App 351

It has been repeatedly held that Chapter 79, Section 187, Ill Rev. Stat 1957, requires the petition for a writ of certiorari to set forth these facts; first, that the judgment was not the result of negligence in the party praying the writ; second, that the judgment, in his opinion, was unjust and erroneous, setting forth wherein the injustice and error consists; and third, that it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing If the petition fails to state any of the requirements of the statute, or if the facts set forth in any of the requirements appear insufficient to support the conclusion, the petition is fatally defective and the order of the writ should be refused, or if granted tentatively, then the writ itself should be quashed on motion for that purpose made in apt time. Auman v. J. Hungerford Smith, 344 Ill. App. 395, 100 N.E. 2d. 797.

In Simpson v. Sligar, 239 Ill. App. 484, the court said, "Appellant's petition is insufficient in that it fails to state wherein the judgment rendered against him was unjust and erroneous. Said petition is further insufficient in that

commonly designated as a court of record. [illegible] 117 Ill. App. [illegible]. It was said in [illegible] 259 Ill. App. [illegible] transcript [illegible] record [illegible] corroborated [illegible] 202 Ill. [illegible]

[illegible] ground [illegible] Compton v. [illegible]

[illegible] 117 Ill. App. [illegible] erroneous [illegible] was [illegible] record [illegible] contain [illegible] claimed [illegible] appeal [illegible] to state any of the [illegible] set forth [illegible] support the conclusion, the petition is fatally defective [illegible] the order of the rule should be vacated, or if quashed [illegible] atively, then the writ itself should be quashed on motion [illegible] that purpose made in apt time. Aumiller v. J. Hungerford Smith, 344 Ill. App. 295, 100 N.E. 2d. 797.

In Simpson v. Silgar, 259 Ill. App. 484, the court said, "Appellant's petition is insufficient in that it fails to state wherein the judgment rendered against him was unjust and erroneous. Said petition is further insufficient in that

the allegations to the effect 'that petitioner is not indebted to the said W. L. Simpson in any sum whatsoever, and that upon a trial of said cause it will appear that the said W. L. Simpson is indebted to your petitioner,' does not meet the requirements of the statute in this respect. Chicago World Book Co. v. Brewer, 57 Ill. App. 526; Couch v. Illinois Cent. R. Co., supra, 431." To like effect, Auman v. J. Hungerford Smith, 344 Ill. App. 395, 100 N.E. 2d. 797; Dayton Scales Co v. Phelps, 259 Ill. App. 43.

Tested by these standards and without detailed reference to the petition, an examination of the petition clearly discloses its insufficiency.

The instant petition sets forth no facts justifying the conclusions that petitioner was not indebted to Ann C. Shaw, that he has a good and meritorious defense, and that the judgment is erroneous and unjust.

Neither does the petition set forth facts sufficient to support the conclusion that the judgment was not the result of petitioner's negligence.

Gertz, the petitioner, was duly served with summons and failed to appear on the return day and alleged no reason for his failure to appear. He states that he was informed that the case was continued as to him as well as Bennett without disclosing from whom he obtained this information. He was present at the hearing on May 21, 1958, which, he states, was a full and complete hearing. He made no inquiry at that time or any other time as to the status of his case. These facts lead us to the inescapable conclusion that Gertz was not without negligence.

the allegation to the effect 'that petitioner is not indebted to the said W. L. Simpson in any sum whatsoever, and that upon a trial of said cause it will appear that the said W. L. Simpson is indebted to your petitioner' does not meet the requirements of the statute in this respect. Chicago World Book Co. v. Brewer, 57 Ill. App. 526; Leach v. Illinois Cent. R. Co., supra, 431. To like effect: Ames v. [illegible] Smith, 244 Ill. App. 595 [illegible] v. Phelps, 59 Ill. App. 45.

Tested by these and [illegible] credence to the petition, an examination of [illegible] discloses its insufficiency.

The instant petition [illegible] the conclusion that petitioner [illegible] that he had a good and meritorious defense, [illegible] is erroneous and unjust.

Neither does the petition [illegible] to support the conclusion that the judgment was not the result of petitioner's negligence.

Gertz, the petitioner, was duly served with summons and failed to appear on the return day and alleged no reason for his failure to appear. He states that he was informed that the case was continued as to him as well as Donnes without disclosing from whom he obtained this information. He was present at the hearing on May 21, 1938, which he states, was a full and complete hearing. He made no inquiry at that time or any other time as to the status of his case. These facts lead us to the inescapable conclusion that Gertz was not without negligence.

His statement on "information and belief" that Spencer J. Shaw prepared the transcript is not compelling.

From the foregoing, it is our opinion that the Circuit Court of McHenry County acting within its discretionary powers was quite correct in quashing the writ of certiorari, and the order quashing the writ will be affirmed.

Affirmed.

Dove--J. and McNeal--J. concur

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BEATRICE MILLER, Plaintiff - Appellee, v. JULIA WILLIAMS, Defendant - Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a replevin action. After numerous motions and two trials, judgment was entered in plaintiff's favor for recovery of a certain automobile and damages of $200. Defendant appeals.

Title to the automobile in question was held by R. D. Miller prior to his death in May, 1957. Plaintiff and Miller were married in 1929 and had four sons during his life; only two are still living. After Miller's death, one of the sons brought the automobile to plaintiff; defendant then removed it from plaintiff's possession and refused to return it. Plaintiff made application to the Secretary of State for a certificate of title to the automobile and now holds title.

Plaintiff testified that she had never been "served with divorce papers" and did not divorce Miller during his life; and that she was not aware of Miller's alleged previous marriage to Annie Reed.

Defendant introduced a marriage certificate to establish the alleged marriage with Annie Reed and one of defendant's witnesses testified that she knew of a marriage between Miller and Annie Reed. This witness also testified that she was present at plaintiff's marriage to Miller. Defendant

introduced another marriage certificate to establish an alleged third marriage of Miller. The only foundation offered to support the certificate was plaintiff's testimony as an adverse witness that she had heard of this alleged third marriage at another trial.

Defendant's theory is that the marriage upon which plaintiff bases her action was bigamous and void and therefore could not support a claim for the automobile. Defendant also contends it was error to award damages.

It is well settled in Illinois that damages may be awarded in replevin actions. Ill. Rev. Stat. 1957, ch. 119, §24; Cottrell v. Gerson, 371 Ill. 174; 31 I.L.P., Replevin, §51. Since there is nothing in the record to indicate that plaintiff filed a cross appeal, she can not argue here that the damages awarded were insufficient.

We agree with plaintiff that a proper foundation was not laid for the admission of the marriage certificate purporting to establish the alleged third marriage of Miller. The only supporting evidence offered was plaintiff's testimony as an adverse witness, that she had heard testimony relating to the alleged marriage at another trial. It is settled beyond controversy that a foundation must be laid before "former testimony" can be admitted as competent in a later case. George v. Moorhead, 399 Ill. 497. Here, there is no evidence that the other witness was not available. In view of this we think the trial court improperly admitted plaintiff's "hearsay" testimony on this point. Likewise, the marriage certificate was improperly admitted and should not have been considered by the court.

Since there is no admissible evidence supporting the alleged third marriage, it becomes necessary to ascertain the validity of the alleged earlier marriages for a determination of this case. Usually when a person is involved in two conflicting marriages, the general presumption in favor of validity of marriage, operates in favor of the second marriage. In re Dedmore's Estate, 257 Ill. App. 519. A party claiming the contrary, has the burden of proving the second marriage invalid. Winter v. Dibble, 251 Ill. 200. In attempting to satisfy that burden defendant introduced a marriage certificate to establish the previous marriage of Miller and Annie Reed and called a witness who testified that she was present at plaintiff's wedding and aware of the previous marriage. Defendant also attempted to introduce divorce records from Mississippi to show that Miller was never divorced from his first wife. However, even if these records were admitted, there would not have been sufficient evidence to overcome the presumption in favor of the second marriage. Mere proof of the prior marriage or that one of the spouses had not obtained a divorce, which is all defendant could have established by the excluded documents, is not sufficient to rebut the presumption of validity. Coal Run Coal Co. v. Jones, 127 Ill. 379; In re Braje's Estate, 294 Ill. App. 377; 26 I.L.P., Marriages § 34. Here, there was nothing to indicate whether the first wife Annie Reed, had died or obtained a divorce and in absence of evidence to the contrary, death or divorce prior to the second marriage is presumed. In re Dedmore's Estate, 257 Ill. App. 519.

In our opinion these presumptions operate in plaintiff's favor to establish her marriage with Miller as valid and as a sufficient basis for recovery in this suit.

Since the trial court correctly considered plaintiff as the wife and heir of the deceased, it properly excluded defendant's testimony. An interested party, such as defendant was here, is an incompetent witness when the other party sues as an heir. Ill. Rev. Stat. 1957, ch. 51, § 2.

For the reasons given the judgment is affirmed.

AFFIRMED.

MURPHY AND KILEY, JJ. CONCUR.

ABSTRACT ONLY.

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EUSEBIUS J. BIGGS, individually and as the assignee of the E.J. BIGGS CONSTRUCTION CO., Plaintiff - Appellant, v. WALTER SPADER, and MRS. WALTER SPADER, his wife, and GUSTAV BEERLY, JR., Defendants - Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY. 22 I.A.2d 381

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit, filed in September 1952, which in Count One seeks to declare null and void a judgment dismissing Biggs' mechanic's lien action in Superior Court case No. 48 S 6425; which in Count Two seeks, in the alternative, judgment in assumpsit; which in Count Three seeks damages for deceit; and in Count Four charges a conspiracy to coerce and slander him. The trial court on January 8, 1958, struck the complaint on defendant's motion; plaintiff stood by his complaint, and the court dismissed the suit. After the dismissal order was entered plaintiff made a motion for a nunc pro tunc, as of January 8, 1958, default judgment on Counts Two, Three and Four. The motion was denied. Plaintiff appealed to the Supreme Court and it transferred the cause here, thereby removing the constitutional questions from the case.

Biggs, in April, 1948, as assignee of the E. J. Biggs Construction Company sued defendant Spader in mechanic's lien and assumpsit actions. The suit was filed by Biggs pro se and the trial court dismissed the suit because Biggs refused to

employ an attorney. The Supreme Court in 1951 dismissed Biggs' appeal from that judgment of dismissal (411 Ill. 42) on procedural grounds and then said, "We have serious doubts as to the propriety of the judgment order in this cause, which appears to have been based solely upon appellant's refusal...to employ an attorney.... Appellant has, of course, a right to appear pro se, but when he does so he must comply with the established rules of procedure." Previously, in 1950, this court in a different case (Biggs v. Schwalge, 341 Ill. App. 268) affirmed a judgment of dismissal against Biggs, because he refused to employ an attorney. The Supreme Court denied leave to appeal.

After his appeal was dismissed in the Supreme Court in Biggs v. Spader he filed pro se, in September, 1952, the instant suit. In Count One in equity he sets out verbatim the complaint filed in 1948 and prays that the judgment of dismissal in the mechanic's lien and assumpsit suit be declared null and void and be set aside.

The dismissal of the Biggs appeal (411 Ill. 42) left undisturbed the judgment of dismissal in the mechanic's lien and assumpsit suit, which is the subject of the instant suit. We must therefore consider the instant suit as a proceeding under Sec. 72 of the Civil Practice Act (Ch. 110, Ill. Rev. Stat. 1957). Under Par. (2) of that section Biggs was required, among other things, to file a petition in the mechanic's lien and assumpsit suit and to support the petition by affidavit to show matters "not of record."

The question is, in the light of these considerations, whether the trial court erred in dismissing the complaint.

Biggs did not comply with Par. (2) Sec. 72 (Ch. 110,

Ill. Rev. Stat. 1957). There is nothing in the record, and no affidavits of "matters not of record," to show what lay under the decision in the mechanic's lien and assumpsit case. In support of that decision we are required to presume that the court had good reason to dismiss. The court may have had a basis for applying the rule in Biggs v. Schwalge, 341 Ill. App. 268, i.e. that the assignment to Biggs was not bona fide and that he was not qualified to appear pro se.

We conclude that the court did not err in dismissing Count One.

The same reason applies to Count Two and Count Three which are based also on alleged assignments from the Biggs Company to Biggs.

Count Four charges the Spaders and their attorney with conspiracy "to illegally use the press to intimidate" Biggs into "dropping the action." We think this allegation is too vague to inform defendants. There is also apparently charged in this Count a conspiracy to slander Biggs by means of the attorney's statements in court. This sets out an occasion of absolute privilege, Parker v. Kirkland, 298 Ill. App. 340, 346, and since there is no pleading in detail of the judicial proceedings from which we can determine the relevancy or irrelevancy of the statements, the charge is insufficient, Dean v. Kirkland, 301 Ill. App. 495, 510.

We have considered all the meritorious points which we deem necessary to the decision.

For the reasons given the judgment is affirmed.

AFFIRMED.

LEWE, P.J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

706

A

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

February Term, A. D., 1959

Term No. 59-F-16. Agenda No. 11

JOHN FINLEY,	)	
	)	
PLAINTIFF-APPELLANT,	)	Appeal from the City Court of the City of East St. Louis, Illinois.
	)	
VS.	)	
	)	
NEW YORK CENTRAL RAILROAD COMPANY,	)	
	)	
DEFENDANT-APPELLEE.	)	

Per Curiam:

Plaintiff was injured in the course of his employment by defendant when he fell on his back while trying to pry a boxcar door shut. The trial judge in the City Court of East St. Louis entered judgment for defendant, notwithstanding a jury's verdict in the sum of $26,750.00. Plaintiff's post-trial motion asking reinstatement of the verdict, and, in the alternative, for a new trial, was denied. The complaint was based on the charge that defendant furnished improper tools and was negligent in allowing the car door and handle to remain defective.

Plaintiff was 23 years old at the time of the injury, January 31, 1957, and had been employed by defendant for seven years. For five years prior to the accident, he had been a car inspector or apprentice

carman. It was his job to inspect all cars and report those needing major repairs so that they could be moved to the repair tracks which were located in the railroad yard where plaintiff was working. Car inspectors, in addition, had the responsibility of closing doors on cars and making "minor running repairs." On January 31, 1957, plaintiff reported for work on the night shift and, because there was snow on the ground, put on some ice cleats furnished by defendant. In the course of his duties, he came upon a loaded boxcar with all doors open. He reported this to a railroad policeman, who was also checking cars, and, at the latter's suggestion, helped close the doors. In the process, one door stuck and plaintiff went to get a large steel crowbar to pry it loose since the closing device attached to the door, called a "puller," was bent and not working properly. As he pried with the bar, the door suddenly sprung closed and plaintiff fell to the ground on his back. He immediately notified the foreman of his fall and went home. Later in the day, he consulted a doctor who diagnosed the condition as spondylolisthesis.

The question presented on review is whether the evidence establishes an evidentiary basis for the jury's verdict when it is examined in its light most favorable to plaintiff. Lavender v. Kurn, 327 U.S. 645, 366 S.Ct. 740. Plaintiff's line of attack

proceeds as follows: 'that plaintiff was under orders to close all car doors; that the only tool available to the night shift was a bar, whereas other shifts had door jacks; that the door in question was damaged and a crowbar was unsuited to such job; that, therefore, injury in the course of use of such improper tool is actionable. Defendant's evidence was directed to establishing that the door jack was a tool used regularly in the car repair shop by repairmen but by car inspectors only infrequently, and then only in the Brooklyn Yard three miles away where cars were made up into trains ready for the road; that the bar was the usual tool used by inspectors for closing doors; and that if the door were damaged, plaintiff should have reported the car as needing repair. The controversy, therefore, centers on the issue of whether the plaintiff was required to perform his duties with a tool unsuited to the job while other inspectors on other shifts had available to them proper equipment.

A companion issue presented is whether the door was, in fact, damaged, since defendant's evidence showed no damaged doors upon a subsequent examination of a car reported by the railroad policeman to be the one plaintiff was working on when injured. This issue was muddied by plaintiff's contention that the wrong car had been examined because there was confusion in the track number.

Plaintiff's evidence on the main issue was made up of his own testimony and testimony of two of the defendant's supervisory employees called as adverse witnesses under Section 60 of the Civil Practice Act. The essential aspects of the testimony of the two adverse witnesses may be summarized as follows: that car inspectors are expected to close doors and are furnished crowbars for this work; that chain jacks are part of the equipment used in the repair shop in the East St. Louis Yard; that if a car has a bad door that cannot be closed with a bar, it is sent to the repair tracks; if it is necessary to close the damaged door before moving it, a repairman is called over with a chain jack; that the repair tracks are used only during the day shift; that chain jacks are available in the Brooklyn Yard for inspectors' use in closing bad doors on cars that are made up in trains ready to go out on the road, there being no repair tracks in the Brooklyn Yard; and that chain jacks are available to inspectors if they need them in the East St. Louis Yard. One of these witnesses knew of no occasion where a car inspector had used a chain jack under similar circumstances. Plaintiff's testimony on this issue is as follows: that he was expected to close all doors, but if he couldn't, he was not to send the car to the repair shop; that he had worked at the Brooklyn Yard, and chain jacks, as well as bars, were there available

for use by inspectors on day or night shift; that no jacks were kept in the inspector's office in the East St. Louis yard but were available at the repair shop to inspectors on the day shift; that they were locked up when the repair shop closed at 4:00 P.M.; that he customarily used a chain jack, if available, to close damaged doors; that he had, however, used a bar to close damaged doors a good many times.

This testimony gives a reasonably clear picture of the role of a car inspector. In the Brooklyn Yard, because cars were then made up ready to go, a car inspector was expected to close all doors, damaged or not, and, for that purpose, had available a chain jack as well as a crowbar. However, in the East St. Louis Yard, where plaintiff was injured, an inspector had the option to send a car to the repair tracks, so that there was not the same urgency about closing doors. True, an inspector had to exercise his discretion and not "shop" every car that was in need of repair. He was also under directions to try and close all doors. But the question is whether, out of the welter of evidence of the practice in the East St. Louis yard, there is made a case of an employee performing an inescapable duty with an inappropriate tool.

We do not think that such was the case.

Plaintiff's job permitted and required the exercise of discretion within the framework of certain directives. He had come up through the job of a car repairman and knew what that job entailed and what damage was regularly referred to the repair shop. He knew that chain jacks were available for use in the repair shop but that inspectors in the East St. Louis yard were expected to use only crowbars on stubborn doors, as he had done on many occasions. While he was expected to cooperate with railroad policemen, he clearly was not required to throw away his years of experience and blindly follow a suggestion to close a door that was damaged and should have been repaired. Further, however, assuming he was under an inexorable duty to obey an absolute directive to close all doors, regardless of condition, and had been furnished an inferior tool for the job, it does not necessarily follow that his injury has been legally related to such circumstances. A fall could easily result while using a crowbar in any situation, either as a result of improper use of the tool, insecure footing, or other cause. It would be sheer speculation to relate plaintiff's fall to an assumed improper tool and place defendant in the position of insuring the safety of its employees in the use of ordinary equipment. In any case, it would be a simple matter to reason backwards from the fact of a fall to the conclusion that the tool used must have

been improper, unless, of course, such tool was the only one ever used for such job.

The railroad's obligation has been stated in the case of Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, as follows:

> "The rule of law is: That the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable."

We feel the evidence presented by plaintiff and his two adverse witnesses pointed up the fact that a crowbar was the standard tool customarily used by inspectors in closing doors that stuck and that the chain jack as a matter of common practice was limited to use in the repair shop and occasionally in the Brooklyn Yard in an emergency. When confronted with this particular door, plaintiff's first thought was to get a bar, as he had on many occasions. The tool used for the job in fact was adequate for the job. The sudden closing of the door was certainly not a wholly unexpected result of plaintiff's prying on it. In fact, prying or twisting with any bar or wrench can result in being thrown off balance and falling if the tool slips or the object pried or twisted suddenly gives way. We feel plaintiff asks too much and a jury goes too far when it finds negligence in a railroad's furnishing crowbars for the

closing of car doors not sufficiently damaged to be sent to the repair shop. We, therefore, must agree with the trial judge that the evidence here construed most favorably toward plaintiff fails to make out a case of a negligent failure to furnish proper tools for the job.

Plaintiff asks in the alternative that the case be remanded for new trial because of alleged errors in the ruling of the Court on the admission of certain evidence. We have examined each ruling pointed out by plaintiff and do not feel that a different ruling would alter the conclusions reached above.

Judgment Affirmed.

Hoffman, J., took no part.

Publish Abstract only.

141

1st DIVISION

Abstract

General No. 11885 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Term, A.D. 1959

FILED

SEP 4 1959

PAUL V. WUNDER

Clerk Appellate Court Second District

HELEN A. HAGNER, Plaintiff-Appellee, vs. ALBERT A. HAGNER, Defendant-Appellant,	Appeal from the Circuit Court of Winnebago County.

22 I.A. 2d 363

DOVE, J.

Upon the application of Helen A. Hagner, the Circuit Court of Winnebago County, on December 11, 1957, entered an order without notice to the defendant, permitting her to file her complaint for separate maintenance instanter and restraining Albert A. Hagner, her husband, from molesting her. Two days later, upon notice and a hearing participated in by defendant an order was entered directing the defendant to move from the premises occupied by the parties and their minor son as their homestead and ordering him to pay $35.00 per week to plaintiff for the temporary support of herself and son.

After the entry of this order on December 13, 1957 defendant did not live on the premises occupied by his wife and minor son. On May 21, 1958 on motion of the defendant a bill of particulars was filed but no further steps were taken in the case until October 16, 1958 at which time plaintiff, by leave of court filed her amended complaint in which she prayed for a divorce on the grounds of extreme and repeated cruelty. In her amended complaint she set forth three specific acts of cruelty

which she alleged occurred on June 30, 1954, April 15, 1955, and on October 1, 1957. The defendant filed an answer to the complaint for separate maintenance in which he averred that the parties were not living separate and apart at the time plaintiff filed her suit, and, therefore separate maintenance would not lie. As to the amended complaint for divorce his answer denied the acts charged against him, pleaded condonation [illegible] and filed a counterclaim for divorce on the grounds of desertion. The period of desertion which he relied upon in his complaint related to the period of time he was barred from the residence where the parties were living at the time plaintiff filed her suit for separate maintenance.

At the commencement of the hearing counsel for plaintiff asked leave to withdraw the complaint for separate maintenance and the trial proceeded upon the issues made by plaintiff's amended complaint for divorce and defendant's answer thereto and the counterclaim of the defendant and the reply thereto. At the conclusion of the trial, the chancellor dismissed the counterclaim of the defendant and awarded plaintiff a decree for divorce. To reverse that decree defendant appeals.

The record discloses that the parties to this litigation were married on December 24, 1932 and three children, two sons and a daughter, were born to the marriage. Two of the children are adults and one, a fifteen year old son, was living with his parents in their home in Rockford until the original complaint was filed and since that time, he has been living with his mother.

It fur[illegible]

[illegible]

[illegible]

[illegible]

[illegible] her balance [illegible] the [illegible] chair [illegible] hit the [illegible]. Her eye became black and swollen and [illegible] for [illegible] days. Upon cross examination she stated, that, upon the occasion, she retaliated and [illegible] slapped [illegible] face".

Appellee further testified that on the [illegible] April 15, 1957, [illegible] husband had another argument [illegible] her home; that he got up from his chair and came over to where she was sitting and without warning struck her [illegible] on the right side of her face bruising her upper cheek and knocking her senseless.

She further testified that on September 1, 1957 while she and her husband were in the kitchen of their home her husband became violently angry and "cornered" her against the cupboard so that she could not move; that he pressed his face against hers and said "all sorts of things to her" and stated: "I am going to get you out of this house yet and make you go to work".

[illegible]

[illegible] heard loud [illegible] and [illegible] language, [illegible]

[illegible] and father were out [illegible] mother were watching television; [illegible] going on in the kitchen and [illegible] heard a lot of [illegible] some profane language; that he and his brother [illegible] kitchen and said [illegible] his father had hit his mother [illegible] of the kitchen and that he and his brother [illegible] their father away; [illegible] that [illegible] was out of the [illegible] and [illegible] a [illegible] quieted down.

[illegible]

[illegible] 2, 19[illegible], [illegible] arral; [illegible]

[illegible] neighbor, [illegible] wife came down the street and [illegible] a black eye.

[illegible] plaintiff as have occurred on April [illegible], 19[illegible], we do [illegible] notified that his wife had visited their [illegible] in South Carolina for two weeks and when she returned he noticed her [illegible] number. As contracted by the counsel [illegible] "She came home and started to talk [illegible] number. I [illegible] get close to my wife. Well, [illegible] answer was always [illegible] leave me alone. I have no feeling for you". We were sitting there, it was late, maybe a night or so. I said 'let's go to bed'. She didn't want to. I stood up, slapped her with my left hand again and then she went to see Attorney Dyer".

[illegible] evidence [illegible] the testimony [illegible] the [illegible] or [illegible] by [illegible] cruelty [illegible] and [illegible] cruelty were [illegible] by the [illegible] testimony [illegible] dutiful affectionate [illegible] basis [illegible]

[illegible] on one occasion [illegible] on her face causing [illegible] swollen cheek [illegible] according [illegible] or touch [illegible] corner of the kitchen [illegible] of their home [illegible] word.

Counsel for appellant say that the married life of the parties to this record was in an uproar for four years prior to their separation. Appellee may not have been at all times a kind, dutiful and affectionate wife and undoubtedly appellant

[illegible]

[illegible] this record [illegible] and that the [illegible] suggest [illegible] [illegible] bodily harm, [illegible] cruelty were [illegible] by the plaintiff [illegible] affectionate [illegible] basis [illegible]

That the evidence [illegible] on one occasion [illegible] told [illegible] like to hear [illegible] on her face causing [illegible] swollen cheek [illegible] according [illegible] didn't want [illegible] corner of the kitchen [illegible] of their home [illegible] work.

Counsel for appellant say that the married life of the parties to this record was in an uproar for four years prior to their separation. Appellee may not have been at all times a kind, dutiful and affectionate wife and undoubtedly appellant

[illegible] entitled to blame for the disorder [illegible] but the record [illegible] conduct on [illegible] justifying a complaint's admitted treatment [illegible] conduct [illegible] not be proved and the chancellor's findings and conclusions, after seeing the parties and listening to their testimony and explanations, that the acts of complaint were not slight and [illegible] of cruelty [illegible] sustained by the evidence.

In [illegible] to Rosenbaum, [illegible] 1 Ill., [illegible] and [illegible] ground for divorce [illegible] of "This court has had frequent occasion [illegible] acts and conduct constituting extreme and repeated cruelty within the meaning of the statute. In Teal [illegible] 2 [illegible], we said the statute means acts of physical violence [illegible] bodily harm, such acts as put the person against whom they are exercised in personal danger and endanger life and limb. Cruelty constituting ground for divorce under the statute means physical acts of violence, bodily harm or [illegible] such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm. (Moore v. Moore, [illegible] Ill. 177.) In [illegible] v. Lipe, 32 Ill. 3[illegible], we said: 'The same act is not the same thing under all circumstances and to all persons. Any willful misconduct of the husband which [illegible] the wife to bodily hazard and intolerable hardship and renders cohabitation unsafe is extreme cruelty. 'Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe.' "

Counsel for appellant calls our attention to the fact that the parties continued to live together three years after the first act of cruelty and six months after the occurrence of April 15, 1957. Counsel insists that by so doing defendant sustained his defense of condonation. Condonation is an affirmative defense and the burden of proof was on the defendant to establish it by a preponderance of the evidence. (Kiekamp v. Kiekamp, 276 Ill. 96.) The parties did live in the same house more than three years after the first act of cruelty was committed by the defendant and more than six months after the act of cruelty committed by him on April 15, 1957 but their relationship was not the normal relationship of husband and wife for some time prior to their actual separation.

In all cases of condonation there is an express or implied condition that the party forgiven will not repeat the offense, but will perform all marital duties the relation imposes. (Kennedy v. Kennedy, 87 Ill. 250, Teal v. Teal, [illegible] Ill. 20[illegible]

The plaintiff's continuance of marital relations with the defendant after his various acts of cruelty was in each case subject to the implied condition that the offenses would not be repeated. Each repetition of the offense was a revival of the offenses previously committed. (Lipe v. Lipe, 227 Ill. 39,42.) This record does not sustain defendant's affirmative defense of condonation.

It is further insisted that the chancellor erred in dismissing defendant's counterclaim for divorce on the ground of desertion. The period of desertion relied upon by

defendant is the time which elapsed following December [illegible] 1957, the date on which the court entered a temporary order, directing defendant to vacate the family home, and December [illegible], 1958 the date he filed his counterclaim. In support of this contention counsel insists that plaintiff acted unlawfully and was guilty of bad faith in first filing her complaint for separate maintenance and later an amended complaint for divorce and cites Baumgartner v. Baumgartner, 16 Ill. App. 2d 2[illegible] where we said that under the pleadings and proof in that case, the action of the wife securing an injunction which resulted in her husband being ejected from his home disclosed she could not have filed her complaint in good faith and she was therefore guilty of desertion.

The facts in the instant case are entirely different. The plaintiff here on December 11, 1957 obtained an injunction restraining defendant from molesting her. Two days later, [illegible] and a hearing participated in by defendant an order was entered finding that defendant was well able to pay temporary support and attorney fees and that it was for the best interests of the parties that the defendant move from the home until a further hearing was had. This order directed defendant to pay $35.00 for the temporary support and maintenance of plaintiff and their minor child, "said sum" continued the order, "to include expenses of [illegible]ing the home". This order granted defendant the right [illegible] visit the minor son of the parties and directed def[illegible] $100.00 attorney fees. Defendant acquie[illegible] these findings and has fully complied with the order, and [illegible] effort to have it [illegible] or modified and it

force until the final decree was entered on this
ber 10, 1958.

is nothing in this record to sustain the appellant's
plaintiff acted unlawfully or in bad faith or
cause for divorce on his counterclaim.
file her complaint for separate
right to invoke the usual processes of
relief she deemed she was entitled to.
amended prior to December 11, 1957, which
requiring him to remain away from the
further order of the court.
dismissing appellant's counterclaim and
divorce on her amended complaint is

Decree affirmed.

701

A

General No. 11278 (Abstract) Agenda 24

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(First Division)
MAY TERM, A. D. 1959

DONALD C. ALLENSWORTH, Plaintiff, vs. 1ST GALESBURG NATIONAL BANK AND TRUST COMPANY (a corporation), et al., Defendants, VICTOR CASKET HARDWARE Company (a corporation), GALESBURG GLASS COMPANY (a corporation), "Counterclaimants", vs. DONALD C. ALLENSWORTH "Counterclaiment." Re: "All that part of Block Eighteen (18) in the City of Galesburg, Knox County, Illinois."	Appeal from the Circuit Court of Knox County

SPIVEY--P. J.

This is an appeal by Donald C. Allensworth from an order entered January 19, 1959, finding him to be in contempt of court in cause No. 14175 in the Circuit Court of Knox County, Illinois.

Donald C. Allensworth has in a host of cases been either a party plaintiff or defendant involving the following-described real estate:

> All that part of Block 18 in said City of Galesburg, Illinois, bounded as follows: beginning at the Northwest corner of said Block and running thence East 156 feet and 9 inches; thence South 60 feet; thence West 156 feet and 9 inches; thence North 60 feet to the place of beginning; together with the building thereon and all tenements, privileges, fixtures and appurtenances therewith belonging, situated in the City of Galesburg, County of Knox, and State of Illinois,

which shall for the sake of brevity be referred to in this opinion as the "subject real estate."

In cause No. 12140 in the Circuit Court of Knox County, the "subject real estate" was the subject matter of a partition action entitled Mary Weinberg, et al., v. Edwin M. Jenkins, et al. Donald Allensworth was a party to that action. As a result of a decree entered in this case, the "subject real estate" was sold to the Victor Casket Hardware Company predecessor in the record chain of title to Galesburg Glass Company. This decree was affirmed by the Appellate Court of Illinois, Second District, and by the Supreme Court of Illinois.

Following the final adjudication of cause No. 12140, and prior to December 7, 1954, Donald Allensworth instituted a suit for forcible entry and detainer in the Circuit Court of Knox County. This suit was for possession of the "subject real estate" and was docketed as cause No. 14175, the instant action.

Defendants in the instant cause No. 14175 were Victor Casket Hardware Company, Galesburg Glass Company, and others. The named defendants Victor Casket Hardware Company and Galesburg Glass Company counterclaimed against the plaintiff Allensworth

[illegible]

[illegible] a party plaintiff or defendant [illegible] real estate

[illegible]

[illegible] operation as [illegible]

[illegible] County, [illegible] partition action entitled [illegible] Jenkins, et al. [illegible] as a result of a decree entered [illegible] real estate" was sold to [illegible] predecessor in the [illegible] Company. This deed was [illegible] Illinois, Second District, [illegible] [illegible] and prior to December 7, 1974, Jerald [illegible] suit for foreclose entry and detainer in the Lake County Court of Knox County. This suit was for possession of the "subject real estate" and was docketed as cause No. 1977, the instant action.

Defendants in the instant cause No. 1977 were Victor Gasket Hardware Company, Galesburg Glass Company, and others. The named defendants Victor Gasket Hardware Company and Galesburg Glass Company counterclaimed against the plaintiff Allenworth

seeking a permanent injunction restraining him from claiming or attempting to claim any right, title, or interest in the "subject real estate."

On December 7, 1954, the Circuit Court of Knox County entered its decree in cause No. 14175. The decree found "That the counterdefendant Donald C. Allensworth, now has no right, title or interest in and to the above described real estate or any part thereof by way of lien, possession, ownership or otherwise, and that the Galesburg Glass Company, a Corporation, is now the absolute owner of all of said real estate. The decree, after making other appropriate findings of fact, ordered the title to the "subject real estate" be quieted and confirmed in Galesburg Glass Company, in fee simple, free and clear of all rights and claims of every kind and character.

The order further provided, "It is further ordered, adjudged and decreed that Donald C. Allensworth be, and he is, hereby restrained and perpetually enjoined from filing any affidavits, actions or instruments affecting the title to the above-described real estate and from asserting any claim or title in and to said premises adversely to Galesburg Glass Company, a Corporation.

"It is further ordered, adjudged and decreed that Donald C. Allensworth be and he is, hereby restrained and perpetually enjoined from instituting, causing to be instituted and filing any action or litigation relating to the above-described real estate, or any part thereof, and against either said Victor Casket Hardware Company, a Corporation, Galesburg Glass Company, a Corporation, or any other firm, person or corporation, relative to said real estate and any interest therein which he pretends to have, which such actions are adverse to such parties or shall be predicated upon any purported

right, title or interest in said real estate of the said Donald C. Allensworth existing as of the time of the filing of the original Complaint in this cause." No appeal was perfected from this decree.

On December 18, 1958, Allensworth filed in the Circuit Court of Knox County as cause No. 14965 his complaint for forcible entry and detainer and summary judgment. Among others, Victor Casket Hardware Company and Galesburg Glass Company were made parties defendant. The complaint sought possession of the "subject real estate."

Again, on January 9, 1959, Allensworth filed in the same court a complaint in ejectment and for summary judgment as cause No. 14972. Victor Casket Hardware Company and Galesburg Glass Company were made party defendants. The recovery of the "subject real estate" was again the jist of the action.

The Circuit Court on January 15, 1959, considered defendants' motion for a rule to show cause against Allensworth in the instant cause No. 14175. Allensworth was present in open court and announced that he was refusing to obey the court. Whereupon the court entered a rule upon Donald C. Allensworth to show cause on January 19, 1959, why he should not be adjudged to be in contempt of court for commencing causes Nos. 14965 and 14972 contrary and in violation of the restraining order of December 7, 1954.

Allensworth filed an answer to the rule to show cause. The answer is a miscellany of irrelevant matter. As best we understand its substance it questions the defendants' interpretation of the Appellate and Supreme Courts' decisions in cause No. 12140, claims illegal possession by the defendants, requests an affidavit of merits of the defendants, states that he is not seeking title and concludes that upon entry of an order of committal he will have his notice of appeal ready.

A hearing was had on the rule to show cause and answer thereto. Sworn evidence was adduced and exhibits introduced being copies of the complaints and other pleadings filed in causes Nos. 14965 and 14972. Allensworth offered no evidence in his behalf and chose to stand on his answer to the rule to show cause.

At the conclusion of the hearing the court entered an order adjudging Allensworth to be in contempt of court for commencing cause No. 14965 and cause No. 14972, and for filing therein various pleadings, documents, and writings now on file therein, all in violation of the injunction decree theretofore entered in this cause on December 7, 1954.

The order further committed Allensworth to the Knox County Jail, there to remain until he purges himself of this contempt and that he may purge himself of contempt by dismissing cause No. 14965 and cause No. 14972, and withdrawing all pleadings, documents, and writings filed therein.

Plaintiff in his brief and argument presents to this court two questions. Irrespective of the assignments of error, we have examined the entire record and conclude that the trial court committed no error in finding the plaintiff to be in contempt of court for filing cause No. 14965 in forcible entry and detainer and summary judgment, and cause No. 14972 in ejectment and for summary judgment contrary to the court's restraining order of December 7, 1954.

The order of the Circuit Court of Knox County is affirmed.

Affirmed.

Dove J. and McNeal J. Concur

Dove J. and McNeal J. Concur

47621

RICHARD GRILL, a minor, by JOSEPH GRILL, his father and next friend, Appellant,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
JOYCE BRADLEY, Appellee.	)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

A verdict was returned for the defendant in the plaintiff's suit for personal injuries. The plaintiff appeals from the denial of his alternative motions for judgment notwithstanding the verdict and for a new trial. The contentions are that the defendant was guilty of negligence as a matter of law, that the verdict was against the manifest weight of the evidence and that error was committed in excluding an exhibit.

Richard Grill, who was six years old, was struck by the defendant's automobile which was being driven in an easterly direction on the south side of Redfield Drive in Marquette Park, Chicago. The accident occurred on a Sunday afternoon in July 1952. He was one of five occupants of a car which had stopped on the south side of the drive and was sitting next to the right front door. As soon as the car pulled to the curb he opened the door, went to the front of the car and started north across the street. No one saw what happened next and the plaintiff

did not testify. The driver of the parked car said that only 20 or 30 seconds elapsed between the time his car stopped and the accident.

The defendant did not see the boy, neither did her father, who was in the front with her, nor did her mother and two guests, who were in the back seat. They all heard an impact on the left side. She stopped immediately and the plaintiff was found on the drive, to the left and rear of her auto.

She had been driving 15 or less miles per hour. There were cars going in her direction, one a car length in front of her; others were parked along the south curb. She said she was watching the road and that there were no distractions; they had just re-entered their auto after resting, had driven less than a block, were not talking and the radio was not playing.

There were many people in the park. One of these was Eleanor Groetch, who, with three friends, was picnicking on the north side of the drive about 40 feet away from where the accident happened. She heard a noise, turned and saw the little boy under the car. She said there were some cars parked on the south side of the street but none on the north directly in front of her.

Some time during the afternoon she had taken a picture of a member of her party. In the background it showed Redfield Drive. This photograph was offered in

evidence for the purpose of showing the traffic conditions, especially the absence of cars parked on the south side of the drive, at the time of the accident. The witness did not say how long before the accident the picture was taken, and she did not testify that it correctly reflected traffic conditions at the time of the accident. It obviously did not, for it contradicted her own testimony that there were some cars parked at the south curb. The trial court properly exercised its discretion in refusing to receive this exhibit in evidence.

The large number of people in the park, the children playing there and the general conditions called for cautious driving and complete control over her vehicle by the defendant. But there is nothing in the evidence, other than whatever deductions may be drawn from the happening of the accident itself, to suggest that she was not careful or did not have adequate control; there is nothing to suggest a violation of law or the nonobservance of traffic regulations. A motion by a plaintiff for judgment notwithstanding the verdict cannot be granted if there is any evidence, or reasonable inferences from the evidence, supporting the material elements of a defendant's case. Hughes v. Bandy, 404 Ill. 74; Merlo v. Public Service Co. of Northern Illinois, 381 Ill. 300. The evidence on behalf of the defendant prohibited the granting of the motion unless

it were to be held that, under the facts of this case, the defendant was guilty of negligence as a matter of law. Negligence becomes a question of law only when it appears under the facts in evidence, and the reasonable inferences therefrom, that all reasonable minds would be compelled to reach the same conclusion. Warren v. Patton, 2 Ill. App.2d 173; Petro v. Hines, 299 Ill. 236.

Of the various allegations of negligence the plaintiff relies most on the one that the defendant did not keep a reasonably careful lookout for pedestrians. His position is that she should have seen him and, since she did not, she was negligent. Cases have been cited which hold that the law will not tolerate the anomaly of allowing one to testify that he looked but did not see, when, if he had looked properly he would have seen. Greenwald v. B. & O. R.R., 332 Ill. 627; Dee v. City of Peru, 343 Ill. 36; Sumner v. Griswold, 338 Ill. App. 190; Tucker v. N. Y. C. & St. L. R.R. Co., 12 Ill.2d 532. This rule arises where the object to be seen is plainly visible, but it cannot be logically applied under the circumstances of this case. The boy came around the front of a parked auto which would have concealed him until he emerged into the open street. He must have arrived there in the very brief interval between the passing of one car and the arrival of the defendant's, one car length behind. There was no testimony of how far he got into the

street before he was struck. There was no proof of what opportunity the defendant had to see him either in distance or in time.

The circumstantial evidence on these points is meager and susceptible to different inferences. The occupants of the defendant's auto heard a thump on the left side of their car; one said it was near the driver; another heard it near the rear wheel; the defendant said it came from the front fender. The child was found to the left of the car. From this it could be deduced that the child must have been well out into the street and was struck by the left side of the defendant's auto. On the other hand Mrs. Groetch, the plaintiff's witness, who was sitting on the grass a few feet from the north curb, saw him bouncing under the car. She saw the auto, not the wheels, pass over him. This would indicate that he had been hit by the front bumper and that the noises came from underneath the car. Whether he was in front of the defendant's car, or to its left, or how far he had emerged from the front of his own car, is speculative. Neither the direct nor the circumstantial evidence would justify our finding that the plaintiff was so plainly visible that the defendant should have seen him and in not doing so was guilty of negligence as a matter of law. The motion for judgment notwithstanding the verdict was properly denied.

Whether negligence is a question of law is for the court to decide; if it is not it becomes a question of fact for a jury. The jury decided the defendant was not guilty, and we are asked to set this verdict aside as being against the manifest weight of the evidence. A six-year old child is not chargeable with contributory negligence. Chicago City Ry. Co. v. Biederman, 102 Ill. App. 617; but it does not follow that because someone injures a child of six he is necessarily liable. Kurzawa v. Brummel, 14 Ill. App.2d 473. The mere occurrence of an automobile accident in which a child is injured does not give rise to an inference of negligence on the part of the motorist. It remains the plaintiff's burden to prove the allegations of negligence made against the defendant. This the plaintiff did not do. The verdict was not against the weight of the evidence. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Schwartz and McCormick, JJ., concur.

Abstract only.

47694

CITY OF CHICAGO, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
HARVEY C. FRANKS, Appellant.	)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The City of Chicago complained that, in February 1957, the defendant, Harvey C. Franks, violated certain sections of chapters 78 and 99 of the City's Municipal Code, by not keeping in proper repair or safe condition premises owned and maintained by him at 3935 West Dakin Street. He was found guilty and fined $200.00.

The defendant raised objections to the constitutionality of these sections of the Municipal Code, as they applied to his property, and appealed directly to the Supreme Court of Illinois. That court found that no constitutional question had been properly raised, that the case was wrongfully appealed and transferred it to this court.

Except for the interjection of the constitutional issue, this case parallels a previous one against the same defendant, City of Chicago v. Franks, 15 Ill. App.2d 189 (1957). In that case Franks was fined for similar violations at the same address. This court upheld the conviction. All the issues raised by the defendant in this case were

passed upon in the prior opinion.

There is before us no record of the proceedings at the trial, and we must assume there was sufficient evidence introduced to support the judgment. ABC Loan Co. of Illinois, Inc. v. Campbell, 1 Ill. App.2d 297. The judgment of the Municipal Court is affirmed.

Judgment affirmed.

Schwartz and McCormick, JJ., concur.

Abstract only.

751

47708

THRIFTI-PAK HOME APPLIANCES, INC., Plaintiff-Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
TONY KOWALCZYK and MRS. F. KOWALCZYK, Defendants-Appellants.	)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendants appeal from an order of the Municipal Court of Chicago denying leave to open a judgment by confession.

The plaintiff's statement of claim was based upon a conditional sales agreement, containing a confession of judgment clause, between Thrifti-Pak Food Plan, a Division of Thrifti-Pak Home Appliances, Inc., and Mr. and Mrs. Kowalczyk, for the sale of food and a sixteen cubic foot V P freezer. The affidavit in support of the motion to open up the judgment alleged "that the defendant did not receive any sixteen cubic foot V P freezer at any time of the plaintiff or any other person."

Section 23(2) of Rule 2 of the Municipal Court of Chicago, which pertains to opening a judgment by confession, provides in part:

> "(2) A motion to open a judgment by confession shall be supported by affidavit as provided by Section 15 of Rule 2 for summary judgments. The plaintiff may file counter-affidavits as to diligence. If the motion and affidavits disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand and the court finds that defendant has been

diligent in presenting his motion to open the judgment, the court shall then sustain the motion either as to the whole of the judgment or to that part to which a good defense is shown, and the case thereafter proceeds to trial...."

No question of diligence is raised, and the principal issue before us is to determine whether the defendants' affidavit disclosed a prima facie defense to the plaintiff's demand. The judgment against the defendants represents, in part, an obligation to pay for a sixteen cubic foot freezer. They deny ever having received such a freezer. This denial, although not as particular as it could be, is in substantial compliance with the rules of the Municipal Court and is sufficient to show reliance upon the failure of consideration. This defense, if sustained, is a valid one and should be submitted to a jury, if the defendants so elect, for determination. Corwith v. Colter, 82 Ill. 585; Liberty State Bank of Bloomington v. Aulgar, 231 Ill. App. 498; Stranak v. Tomasovic, 309 Ill. App. 177. We believe the motion to open up the judgment should have been allowed.

The defendants' affidavit, together with a supplemental affidavit, presented other arguments in support of their motion. One of these was that the plaintiff altered and changed the terms of the contract without the assent of the defendants. This defense is twofold. First, the defendants maintain that the plaintiff added amounts to the terms of sale. Secondly, they contend that the plaintiff inserted the words "Serial #41796," which the parties agree has reference to the

freezer. The defendants concede that at the time the contract was entered into there was no prohibition against filling in blank spaces.

The defendants were to pay four installments of $79.50 each and twenty installments of $37.50 each. This totaled $1,068.00. The plaintiff, on its own copy, also showed the total amount due was $1,068.00 but divided this amount into a cash delivered price of $882.00 and a finance charge of $186.00. We are unable to determine that the figures added by the plaintiff changed the amount which the defendants contracted to pay.

However, the insertion of the serial number presents a different problem. The parties contracted for a sixteen cubic foot freezer. The plaintiff claims there was no mention of a serial number at the time of contracting because the plaintiff did not know the exact freezer the defendants were to receive and that when the freezer was delivered the correct number was entered. The defendants deny that they received a sixteen cubic foot freezer, and even though they may have received freezer #41796 there would still be a failure of consideration if, in fact, this freezer was not one of sixteen cubic feet. The serial number may represent a freezer of a different size. If this is so, the insertion of this serial number was a modification of the terms of the contract and is another issue which should be determined upon a trial.

Other arguments advanced were that the plaintiff,

at the time judgment was entered, was not the holder of the agreement but had assigned it to the Devon Northtown State Bank and that the agreement was represented to the defendants as a contract for the lease of a freezer and for the sale of food. We see no merit in these allegations; we agree with the trial court's decision in reference to them.

A further point, raised for the first time on appeal, is that the plaintiff was not the proper party to confess judgment because the contract was made between Thrifti-Pak Food Plan and the defendants. The agreement, on its face, states that the seller is Thrifti-Pak Food Plan, a division of Thrifti-Pak Home Appliances, Inc. Thus, the plaintiff was a party to the contract and could confess judgment.

The order appealed from is reversed, and the cause is remanded with directions to open the judgment.

Order reversed and cause
remanded with directions.

Schwartz and McCormick, JJ., concur.

Abstract only.

No. 11233 Publish abstract only Agenda 4

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

MAY TERM, A.D. 1959

HAROLD W. JOHNSON, Plaintiff-Appellant, vs. LLOYD C. RINGLE, Individually and as Trustee, METALINES, INC., an Illinois corporation, BEATRICE E. JOHNSON LITTELL, HILMER L. JOHNSON, ATWOOD VACUUM MACHINE COMPANY, a corporation, FRANK LITTELL and SPEED METALS, INC., a corporation, Defendants-Appellees	)	Appeal from the Circuit Court of Winnebago County.

WRIGHT -- P. J.

This action was brought by plaintiff Harold W. Johnson in a three count amended complaint. In Count I plaintiff sued all defendants for the benefit of shareholders of Speed Metals, Inc., and prayed that Lloyd C. Ringle be restrained from operating Speed Metals, Inc.; that a receiver be appointed and an accounting had, and the assets of Speed Metals, Inc., be turned over to a receiver and that Metalines, Inc., be ordered

No. 11[illegible]

[illegible]

[illegible] -- [illegible]

This action was brought by [illegible]

a three count complaint [illegible]

all defendants [illegible]

Inc., and prayed that [illegible]

operating Speed Metals, Inc.; that a receiver be appointed and

an accounting had, and the assets of Speed Metals, Inc. be

turned over to a receiver and that Metalines, Inc., be ordered

to turn over its assets to a receiver. In Count II plaintiff sued Lloyd C. Ringle, individually and as Trustee, and prayed for a $100,000 judgment against him. In Count III plaintiff sued individually all defendants and asked for a $100,000 judgment.

The case was heard by the trial judge without a jury and the trial court found the issues on all three counts in favor of the defendants, dismissed Count I for want of equity and entered judgment in defendants' favor on Counts II and III. From this action of the trial court plaintiff has taken this appeal.

A determination of this cause requires a detailed analysis of the evidence adduced on the hearing in the trial court. The Atwood Vacuum Machine Company maintained a sheet metal department and prior to September 1, 1953, employed the plaintiff as foreman. Atwood decided in 1953 to discontinue that department and the plaintiff said he would like to go into business for himself and, thereafter, plaintiff leased space from Atwoods. Plaintiff, whose nickname is "Speed", started in business in September of 1953 and adopted the trade name of Speed Metals. In February of 1954, he incorporated as Speed Metals, Inc. with himself as president. Plaintiff owned 820 shares in Speed Metals, Inc. and his wife, Beatrice W. Johnson, owned 820 shares and 650 shares were owned by four

to turn over his assets to a receiver. [illegible] plaintiff filed Lloyd C. Kingle, individually [illegible] for a $100,000 judgment against him. [illegible] plaintiff sued individually all defendants [illegible] judgment.

The [illegible] by the trial court [illegible] the trial court found for [illegible] of the defendants, [illegible] entered judgment in [illegible] favor of [illegible] From this section of the trial court plaintiff [illegible] appeal.

A determination of this cause requires a detailed analysis of the evidence adduced in the hearing in the trial court. The Atwood Farm Machine Company maintained a sales manual department and prior to September 1, 1953, employed the plaintiff as foreman. Atwood decided in 1953 to discontinue that department and the plaintiff said he would like to go into business for himself and, thereafter, plaintiff leased space from Atwood. Plaintiff, whose nickname is "Speed", started in business in September of 1953 and adopted the trade name of Speed Metals. In February of 1954, he incorporated as Speed Metals, Inc. with himself as president. Plaintiff owned 820 shares in Speed Metals, Inc. and his wife, Beatrice W. Johnson, owned 820 shares and 630 shares were owned by four

other individuals. In May or June of 1954, plaintiff went to see Seth G. Atwood and then to Lloyd C. Ringle, both of whom were officers of Atwoods, and stated that he was in financial difficulties. A balance sheet of Speed Metals, Inc. was then prepared which disclosed that since its incorporation it had lost $15,644.35, was overdrawn at the bank in the sum of $273.90, owed current accounts of $29,926.46 and was delinquent in conditional sales contracts in the amount of $28,655.97. A written agreement, hereinafter called the first trust agreement, was executed between Speed Metals, Inc., all of its shareholders, its major creditors, and Lloyd Ringle and Carl Samuelson, as trustees. One creditor, Emil Anderson, did not enter into the agreement. This agreement provided that said two trustees were appointed to operate, manage and control the business until the debts of Speed Metals, Inc., were paid. Speed Metals, Inc. operated for one year under this first agreement and the unsecured creditors were paid off. Thereafter, there were difficulties between the plaintiff and Samuelson and it was decided that a second trust agreement would be entered into without Samuelson as a trustee.

The second trust agreement was executed by all of the shareholders of Speed Metals except F. S. Welsh, who was the attorney that drafted the agreement and also owned 50 shares in the company. All of the creditors of the corporation

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The second trust agreement was executed by all of the shareholders of Speed Metals except E. S. Welsh, who was the attorney that drafted the agreement and also owned 10 shares in the company. All of the creditors of the corporation

signed it and were designated as parties of the fourth part, hereinafter called creditors, except Emil Anderson, who again was left out at the request of the plaintiff. The agreement provided that the trustee, Lloyd C. Ringle, was to have complete charge of Speed Metals as though he owned it and he was to "conduct and operate the business, in his judgment, for the best interest of the creditors." The second agreement further stated that it was for the best interests of Speed Metals and the creditors to operate the business under the supervision of a trustee. The trustee, from the proceeds of the business, agreed to pay current operating expense, all current government claims and a fixed amount to creditors.

The business continued under Mr. Ringle's direction and the creditors were being paid. Mr. Ringle requested the plaintiff, who continued during all this time in the employ of the company, to devote more time solicitating business and let another employee, Mr. Littell, the foreman, run the shop. The plaintiff did not heed the request but spent most of his time on details of shop operation. In January, 1956, the plaintiff fired the foreman, Frank Littell. Mr. Ringle told the plaintiff that he had exceeded his authority and that Mr. Littell was essential to the business, and that Littell was not fired. When the plaintiff refused to accede, Mr. Ringle terminated the plaintiff's employment and finally found it

[illegible]

necessary to obtain an injunction against further interference by the plaintiff. Thereafter, payments to creditors continued until June, 1956, when they were stopped because of lack of funds.

At the time of the first trusteeship Mr. Ringle told plaintiff that Emil Anderson, being one of the creditors, would have to sign the agreement. The plaintiff stated he would like to have Mr. Anderson left out of the agreement, that he was an elderly Swedish gentleman who lived with his (plaintiff's) folks, and that he didn't speak English well and wouldn't understand. Plaintiff said he would be personally responsible for the fact that Emil Anderson would not cause the trustees or company any trouble if Anderson were not requested to sign the agreement. Before the second trusteeship, Mr. Ringle told the plaintiff that Emil Anderson had not signed the first agreement, and that they wanted him to sign the second. The plaintiff asked that he be left off for the same reason as before. However, Anderson thereafter sued the company on his note. No demand, notice or request for payment was given to Mr. Ringle before suit was filed by Emil Anderson against Speed Metals, Inc. When Mr. Ringle received notice of the suit filed by Emil Anderson, he called Emil Anderson's attorney, James Berry, and told him that Speed Metals didn't have the money to pay Anderson, that the

government was pressing for payment of delinquent withholding and social security taxes, and that they could only meet the payroll and keep up bills. Mr. Ringle offered to pay the interest on Anderson's note and told Mr. Berry that the plaintiff had assured him he would see to it that it would not be embarrassing to the Trusteeship if Emil Anderson was left off the agreement. Mr. Berry said that the plaintiff now felt differently about it.

In August of 1956, the Federal Government insisted that the company pay approximately $3,500.00 for delinquent withholding tax payments or the government would file a lien which would have put the company out of business. Atwoods loaned some money to the company, took a chattel mortgage on everything, and received assignments of conditional sales contracts in order to secure the loan. The government claim was for withholding and social security taxes withheld from employees before Ringle became a trustee.

Emil Anderson went to the plaintiff in May 1956, and the plaintiff went to see his own attorney, James Berry, to see what he could do about collecting the note for Anderson. The plaintiff then made arrangements for Attorney James Berry to see Emil Anderson. There was a meeting of James Berry, the plaintiff and Emil Anderson, at which time some of the arrangements for Emil Anderson bringing the suit against Speed

Metals, Inc., were made. After judgment was obtained by Emil Anderson through the offices of his attorney, James Berry, an execution was placed in the hands of the Sheriff. The plaintiff went with Chief Deputy Sheriff King and Deputy Sheriff Pratt to Speed Metals' place of business to make a levy on the assets. Later on the same day the plaintiff, Emil Anderson and James Berry went with the same deputy sheriffs to Speed Metals, Inc., to finish the levy. Pursuant to the execution and levy, a sale of the assets of Speed Metals, Inc., was held on January 7, 1957, at the court house. The plaintiff knew the date, the time and the place where the sale was to be held, but neither he nor Mr. Berry attended the sale. At that time everything of Speed Metals, Inc., that was levied upon and sold by the Sheriff was subject to conditional sale agreements and first and second chattel mortgages, all of which were delinquent. These totaled $35,666.54. The appraised value of the items sold at the Sheriff's sale without considering the liens was $11,375.00, which appraised value was not disputed.

At the Sheriff's sale Attorney L. W. Menzimer bid the amount of the judgment plus the costs for the items sold, being the sum of $2238.76. He used a nominee for the purchase, one Hilmer Johnson. Hilmer Johnson later gave a bill of sale for the assets to Metalines, Inc., a corporation. Metalines,

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being the sum of $2238.76. He used a nominee for the purchase,

one Hilmer Johnson. Hilmer Johnson later gave a bill of sale

for the assets to Metalines, Inc., a corporation. Metalines,

Inc., was formed a few days after the Sheriff's sale and the shareholders are Beatrice W. Littell, former wife of the plaintiff, Frank Littell, Allen Bailey, Ivan Seele, and Mr. Ringle. Metalines rented the space that Speed Metals had occupied and finished up Speed Metals' order at cost, giving all the profit to Speed Metals, Inc.

There were some items of Speed Metals' that were not sold by the Sheriff. There was an inventory of ornamental hardware in the second story of Atwood's building, which Mr. Ringle liquidated after the Sheriff's sale and credited the income to Speed Metals. Metalines assumed the obligations on the conditional sales contracts and chattel mortgages. When it looked as if the property might go to a Sheriff's sale, Mr. Ringle checked with Joseph Behr & Sons and Carl Saga, both creditors, and was told they would go along with a purchaser at the sale if Ringle was interested in it and agreed to carry the indebtedness with any purchaser with whom Mr. Ringle was connected.

The plaintiff contends that the trial court erred in refusing to hold that Lloyd C. Ringle owed a fiduciary duty to Speed Metals, Inc.; that the actions of Ringle created a constructive trust for the benefit of Speed Metals, Inc. in property belonging to it; that the purchase at the Sheriff's sale of the assets of Speed Metals, Inc. by a nominee of Ringle and the transfer of said assets to Metalines, Inc. was

illegal and void, and that Ringle, the Littells and Atwood Vacuum Machine Company conspired to deprive Speed Metals, Inc. of its assets and property.

It is the position of the defendants' that the creditors were the primary beneficiaries under the first and second written agreements and that none of the defendants violated any obligation to the creditors; that plaintiff is estopped from asserting any claim against the defendants arising from the Sheriff's sale because the plaintiff created the condition leading to the judgment and encouraged and arranged the negotiations leading to the judgment and subsequent sale, and that there was no fraud in the conduct of Ringle in the purchase of the assets at the sale which defendants contend were sold at a fair price and everyone, including the plaintiff, had an opportunity to bid.

While the agreement referred to as the second trust agreement was not a trust agreement for the benefit of creditors, its objects were the same. A trust for the benefit of creditors as a class is recognized in equity under the theory that a failing or insolvent debtor may assign all or a portion of his property to a third party as trustee for the purpose of paying the creditors. Trusts of this nature are commonly known as assignments for the benefit of creditors and have an early history in the law of this state. Black V. Palmer, 15

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early history in the law of this state. Hiock v. Palmer, 13

Ill. App. 2d 207, 145 N. E. 2d 797. A review of the evidence in the record before us and a reading of the second trust agreement reveals that it was the clear intent of Speed Metals, Inc. to enter into the agreement for the benefit of its creditors. It is also apparent that Speed Metals was in failing circumstances and that the trustee did his utmost to see that the creditors were paid.

The second trust agreement provided that the trustee, Ringle, accepted the appointment without compensation, that he would not be responsible for or held personally liable for any of the debts or obligations of Speed Metals, not liable for his conduct of the affairs of Speed Metals, nor liable in any manner whatsoever except for wilful misconduct or fraud. It has been repeatedly held that a trustee who accepts an appointment without compensation with the provision that he shall not be responsible for, or held personally liable for, any of the debts or obligations of the debtor, nor liable for his conduct in the affairs of the debtor, nor liable in any manner whatsoever except for wilful misconduct or fraud would only be held liable for fraudulent conduct resulting in a loss to the trust estate. Williams v. Northern Trust Co., 316 Ill. App. 148, 44 N. E. 2d 333; Schumann-Heink v. Folsom, 328 Ill. 321, 159 N. E. 250; Burns v. Hines, 298 Ill. App. 563, 19 N.E.

2d 382. It is apparent from the record that Ringle at all times did his best to conduct the business of Speed Metals for the best interest of the creditors. The trial court found no evidence of wilful misconduct or fraud upon the part of the trustee in the affairs of the company or in the Sheriff's sale with which findings we agree.

It appears from the record that the plaintiff would not have complained had a third party been a high bidder at the Sheriff's sale, but it was only when he found the defendants had incorporated an organization assuming the secured debts and carrying on the business that plaintiff objected. There was no duty on the part of the plaintiff to attend the sale but it is highly significant that he did not. The only inference from the conduct of the plaintiff can be that his main objective was to close Speed Metals. It is further significant that the trial court in its findings and reasons for decision made the following statement:

> "From an examination of all the evidence in this case, I am of the opinion that there was no fraud in the conduct of Mr. Ringle in the purchase of this property, that the property as purchased with the encumbrances on it was a fair price. It was a Sheriff's sale, where everybody had an opportunity to bid on it, if they cared to.
>
> "I feel in this instance, Mr. Speed Johnson, the plaintiff herein, by his

> conduct in encouraging Mr. Anderson to obtain judgment against the Speed Metals Company, whether it was due to the fact he was disappointed or disgruntled, nevertheless he puts himself in the position we find him."

In this case the trial court saw, observed and heard the plaintiff, defendants and witnesses testify and as has been stated in numerous decisions the trial judge of course, is in a much better position to determine the facts and credibility of the witnesses than is a court of review. Warner v. Gosnell, 8 Ill. 2d 24, 132 N. E. 2d 526. An Appellate court is at such a disadvantage in reviewing a case on the facts from the printed record, as compared with the trial judge who lived with the trial and heard and observed the witnesses in the flesh, that it is reluctant to interfere with the factual findings of the trial judge and will not do so unless it is manifestly erroneous. Two conflicting stories may look equally plausible in the record, but one or the other may not sound true when actually heard. Not merely what a witness says but how he says it is important. His manner in testifying, the look in his eye, the expression on his face, his hesitancy or forthrightness--these are things which a trial judge or jury can observe and weigh in determining whether to accept, reject or discount a witness's testimony.

Plaintiff contends that this action was not only brought

for himself but for other stockholders. A stockholder who brings a class action on behalf of himself and others must show that he is, himself, entitled to relief. Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683; Central Standard Ins. Co. v. Davis, 10 Ill. 2d 566, 141 N. E. 2d 45. The act of the plaintiff in inducing the trustee to omit the creditor Anderson from both trust agreements now estopps the plaintiff from complaining when this same creditor obtains a judgment and enforces the same. Casler v. Byers, 129 Ill. 657, 22 N.E. 507; Bremmer v. Franke, 18 Ill. App. 2d 202, 151 N.E. 2d 650.

In a chancery proceeding as well as a case at law, the burden is on the plaintiff to prove his case by a preponderance of the evidence, Carpenter v. Young, 280 Ill. App. 1[illegible]. To prove a resulting or constructive trust, plaintiff is even under a greater burden of proof. A party seeking to establish resulting trust has burden of proof, and must prove it by clear, strong and unequivocal evidence. Hummel v. Villmow, 347 Ill. 58, 179 N. E. 438; Tritchler v. Anderson, 334 Ill. 211, 165 N. E. 641. We are compelled to agree with the findings of the trial court that the plaintiff failed to prove his case by a greater weight of the evidence and has failed to comply with any degree of proof required to raise a constructive or resulting trust. The trial court, therefore, was

correct in dismissing Count I of the complaint for want of equity and in finding the issues for the defendants on Counts II and III.

For the reasons herein stated, the decree and judgment of the Circuit Court of Winnebago County are hereby affirmed.

DECREE AND JUDGMENT AFFIRMED.

CROW., J., AND SOLFISBURG, J., CONCUR

CROW, J., AND SOLTISBURG, J., CONCUR

735

1st DIVISION

NO. 11256 (Publish Abstract Only) Agenda 16

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

FEBRUARY TERM, A. D. 1959

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee, vs. WILLIAM HARRY DEE, Defendant-Appellant.	Appeal from the County Court of DeKalb County

McNEAL, J. -

By this appeal the defendant, William Harry Dee, seeks to reverse a judgment of the County Court of DeKalb County finding him guilty of the offense of disorderly conduct,--lewd and lascivious act.

In an information filed by the State's Attorney, it was charged in the language of the statute (Sec. 55a, Div. I of the Criminal Code, Par. 159a, Ch. 38, Ill Rev. Stat. 1957) that the defendant committed the offense on July 30, 1958, in DeKalb County, Illinois. The information was filed on September 9, 1958, and on the same day defendant and his attorney appeared before the court. Defendant was arraigned and given a copy of the information and a list of the witnesses. He entered a plea of not guilty and waived trial by jury.

The trial before the court without a jury was commenced on September 10. The People called three witnesses: the prosecuting witness and two state police officers, Donald Fraher and Robert A. Bales. Ten witnesses were called by the defense, primarily to establish an alibi. The People then called four witnesses in rebuttal. The

1st DIVISION

NO. [illegible] [illegible]

McNEAL, J.

By this appeal [illegible] seeks to reverse a judgment of [illegible] guilty of the offense of [illegible]

In an information filed [illegible] charged in the language of [illegible] of the Criminal Code, [illegible] Stat. [illegible] that the defendant committed the [illegible] 1958, in [illegible] County, Illinois. The information was filed [illegible] 3, 1958, and on the same day defendant and his attorney appeared before the court. Defendant was arraigned and [illegible] the information and a list of the witnesses. He entered a plea of not guilty and waived trial by jury.

The trial before the court without a jury was commenced on September 10. The People called three witnesses: the prosecuting witness and two state police officers, Donald Fracher and Robert A. Bales. Ten witnesses were called by the defense, primarily to establish an alibi. The People then called four witnesses in rebuttal. The

trial was concluded on September 11, and the court then adjudged defendant guilty as charged, and sentenced him to confinement in the county jail for a term of sixty days. Defendant petitioned the court for probation on September 16, and on the 23rd this petition was denied and defendant filed an appeal bond and notice of appeal. Although the proper method for review of a conviction is by a writ of error, where an appeal is taken and joinder is effected without objection, this court may consider the case as if the proper method for review had been pursued.

Defendant contends that the trial court erroneously admitted in evidence certain confessions of the defendant and incompetent testimony purporting to identify him as the alleged offender, and that the evidence fails to prove the defendant guilty beyond a reasonable doubt.

The prosecuting witness was a married woman and the mother of a daughter aged seventeen and a son twelve. About 3:30 P.M. on July 30, 1958, she left her employment near Kirkland and commenced to drive her car to her home at Kingston. She testified that when she was driving along a blacktop road about two miles north of Kirkland, she observed a green 1957 Ford parked and backed at an angle into a driveway along the road. The side of the car was marked with a gold colored stripe. As she came closer a man ran out in front of the marked car and "bared himself" right out in front of her so she had to swerve to get around him. His shirt and trousers were open and he wore no underwear. Everything below his belt was exposed. She was riding alone. She continued on home and reported the incident to the sheriff and chief of police at Kirkland the next morning. She also testified that she had identified the defendant as the man who exposed himself on July 30, at a line-up of six persons at the county jail at Sycamore August 26. On cross-examination it was disclosed that two other women were also at the line-up and thereafter signed complaints against the defendant.

Officer Fraher testified that on August 26 he was patrolling in the Kirkland area where the exposure incidents had been reported, and saw a man and a car conforming with the descriptions in the reports.

Defendant was arrested and displayed in the line-up. Subsequently he signed a statement in which he admitted the incident on July 30. He also signed another statement admitting similar acts on other occasions. A copy of the first statement was served on the defendant the day before trial. While Officer Fraher was on the stand, he was asked to read the statement. He read a portion of the statement and the following colloquy ensued:

"Mr. Rissman: I am going to object, your Honor, to the rest of the statement. It has only been identified. I wish to cross-examine him before anything like that gets into the record. Maybe at some further time at this hearing it might be admissible. At this time it is not admissible.

"The Court: The State's Attorney has the right to offer it as an exhibit.

"Mr. Swanson: Your Honor, I have not offered it yet. I intend to mark it for identification. He can certainly cross-examine on it after the direct examination.

"Mr. Rissman: That has not been done at this time.

"The Court: You may proceed to introduce it as evidence, if you wish.

"Mr. Swanson: Now would you continue reading the statement which has now been marked People's Exhibit 1 for identification.

"Mr. Rissman: I object to it again, reading of it at this time into the record.

"The Court: Objection sustained. If * * * it is not proper as an exhibit, it should not be read into the record. If it is proper, it can be read after it has been introduced.

"Mr. Swanson: Your Honor, I will offer this as People's Exhibit 1.

"The Court: Very well.

"Mr. Rissman: Objection.

"The Court: What is your objection?

Defendant was arrested and displayed [illegible]

signed a statement in which he admitted the [illegible]

also said [illegible] another statement [illegible]

A copy of the first statement was [illegible]

[illegible] Trooper Miller was on [illegible]

statement. He was [illegible]

answer:

Mr. Rissman: I do [illegible]

on the state ment. It was only [illegible]

he, before [illegible]

[illegible]

he not [illegible]

The Court: [illegible]

as an exhibit.

Mr. Swanson: [illegible]

[illegible] the defendant [illegible]

on it after the direct examination.

The Court: [illegible]

The Court: [illegible]

if you wish.

Mr. Swanson: Now would [illegible] attitude [illegible] the statement which has not been marked People's Exhibit 1 for identification.

Mr. Rissman: I object to it again, namely of it at this time into the record.

The Court: Objection sustained. It * * * it is not proper as an exhibit, it should not be read into the record. It is not proper; it can be read after it has been [illegible]

Mr. Swanson: Your Honor, I will offer this as People's Exhibit 1.

The Court: Very well.

Mr. Rissman: Objection.

The Court: What is your objection?

"Mr. Rissman: I object to this. The man who signed it hasn't had the opportunity to be on the stand at this time.

"The Court: What?

"Mr. Rissman: He hasn't been on the stand.

"Mr. Swanson: Your Honor, he certainly will be on the stand later.

"The Court: Objection overruled. It may be admitted.

"Mr. Swanson: Would you read the statement, Officer?

"Mr. Rissman: I object to the statement being read. If it is in evidence it speaks for itself.

"The Court: He can read it into the record. There is no jury in this case."

The statement was then read by Officer Fraher. The second confession was also admitted and read into the record. Defendant's counsel stated that his objection to the second statement was the same as to the first, i.e. that the person who signed it has not had an opportunity to be cross-examined on it.

Defendant now contends that the trial court committed error in admitting the confessions because Section 729 of Chapter 38 of the Illinois Revised Statutes was not complied with by service of copies of the alleged confessions and a list of the names and addresses of all persons present at the time they were made; because not all of the persons present at various times during the taking of the alleged confessions were called as witnesses; because of the failure of the trial court to conduct a preliminary hearing to determine the circumstances under which the confessions were made; and because the confessions were not made voluntarily.

As can be seen, no objection as to any of these points was made at the trial, and the only objection made was that the defendant hadn't been on the stand. No motion for a new trial or any other motion was made setting forth the errors now alleged by the defendant. The trial court did not rule on the objections now raised by the defendant. Errors committed by a trial court must be preserved by

[illegible]

hasn't had the opportunity to be on the [illegible]

The Court: What?

Mr. Freeman: He hasn't even [illegible]

Mr. Swanson: [illegible]

later.

[illegible]

Mr. [illegible]

Mr. [illegible]

Mr. [illegible]

It is in evidence [illegible]

The Court: [illegible]

jury in this case.

The [illegible]

conferring the dire [illegible]

so-called alleged "[illegible]

as to the direct [illegible]

opportunity to be [illegible]

Defendant now [illegible] that the [illegible] error in admitting the testimony of George [illegible] and [illegible] the Illinois Motorcycle Patrolman [illegible] regarding the [illegible] of the alleged [illegible] and [illegible] of all persons present [illegible] the time they were [illegible] before the [illegible] or all the persons present at various times during the taking of the alleged confessions were called as witnesses, resulted in the failure of the trial court to conduct a preliminary hearing to determine the circumstances under which the confessions were made, and because the confessions were not made voluntarily.

As can be seen, no objection as to any of these points was made at the trial, and the only objection made was that the defendant hadn't been on the stand. No motion for a new trial or any other motion was made setting forth the errors now alleged by the defendant. The trial court did not rule on the objections now raised by the defendant. Errors committed by a trial court must be preserved by

timely objections or motions, and rulings thereon should be made by the trial court. If no objections were made at the time of the trial, such objections cannot be considered for the first time on appeal. People v. Holt, 398 Ill. 606, 613, 76 N.E. 2d 474; People v. Mulford, 385 Ill. 48, 55, 52 N.E. 2d 149; People v. Ficarrotta, 385 Ill. 108, 111, 52 N.E. 2d 166.

Defendant also contends that the trial court erred in admitting into evidence the testimony of the complaining witness and others concerning the identification of the defendant at the time he was arrested. During the trial she testified that on August 26 she was taken to the county jail in Sycamore and was shown six people lined up in a row, that she identified the defendant as being the man she saw on July 30 on the blacktop road as she was driving out of Kirkland, and that at the line-up she pointed him out to the officer present. She also identified the defendant in the courtroom. Defendant made no objections to any of this testimony. Although not mentioned on direct examination, during the cross-examination of this witness, it was brought out that two other women were present at the county jail and identified the defendant as being the man who had exposed himself on other dates and in the same vicinity. Again we hold that unless a proper objection is made at the trial, errors committed, if any, cannot for the first time be raised on review.

Defendant next suggests that the trial court erred in not giving sufficient weight to the alibi testimony of the defense and also in finding the defendant guilty beyond a reasonable doubt. Alibi is an affirmative defense. Where the crime has been proven, together with evidence tending to show the identity of the defendant, the burden of establishing the alibi rests on him, although upon the whole case his guilt must be proven beyond a reasonable doubt. People v. Wheeler, 5 Ill. 2d 474, 483, 126 N.E. 2d 228; People v. Renallo, 410 Ill. 372, 376, 102 N.E. 2d 116; People v. Kerbeck, 362 Ill. 251, 256, 199 N.E. 789. Since this case was tried without a jury, the court

timely objections or motions, [illegible] the trial court. If an objection [illegible] such objections cannot be considered for the first time [illegible] People v. Mack, 390 Ill. [illegible] 2d Ill. 40, [illegible] 32 N.E. [illegible] People v. [illegible] 111, 32 N.E. 84 [illegible].

Before [illegible] admitting [illegible] other [illegible] was [illegible]. [illegible] was [illegible] the [illegible] Mill [illegible] was [illegible] present. He also [illegible] [illegible] unknown or [illegible] which [illegible] court, [illegible] [illegible] incriminating [illegible] committed, [illegible] [illegible]

[illegible] giving sufficient weight to the mitigating [illegible] also in finding the defendant guilty beyond a reasonable doubt. Allgh is an affirmative defense. Where the [illegible] proven, together with evidence tending to show the [illegible] of the defendant, the burden of establishing the alibi rests on him, although upon the whole case his guilt must be proven beyond a reasonable doubt. People v. Wheeler, 5 Ill. 2d 474, 483, 126 N.E. 2d 258; People v. Rosillo, 410 Ill. 372, 376, 102 N.E. 2d 116; People v. Kerbeck, 362 Ill. 251, 256, 199 N.E. 763. Since this case was tried without a jury, the court

heard the testimony and from all of the evidence found the defendant guilty. Although the evidence was conflicting, it is ample to sustain the conviction beyond a reasonable doubt. Where a cause is tried without a jury, the trial court has the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting, this court will not substitute its judgment for that of the trial court. People v. Mero, 4 Ill. 2d 327, 335, 122 N.E. 2d 796; People v. Renallo, 410 Ill. 372, 376, 102 N.E. 2d 116; People v. Bolger, 359 Ill. 58, 68, 194 N.E. 225.

The judgment of the county court of DeKalb County is affirmed.

Judgment affirmed.

SPIVEY, P. J., and DOVE, J., concur.

47627

CITY OF CHICAGO, a Municipal Corporation, Appellant, v. WILLIAM BROWAR and CHARLES SWIBEL, Appellees.	)	CONSOLIDATED CASES.
CITY OF CHICAGO, a Municipal Corporation, Appellant, v. WILLIAM BROWAR, Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
CITY OF CHICAGO, a Municipal Corporation, Appellant, v. MARKS & COMPANY, Appellee.	)	

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The City of Chicago filed separate ordinance enforcement suits in the Municipal Court of Chicago, No. 58 MC 406727 against Marks & Company, No. 58 MC 406728 against William Browar, and No. 58 MC 406730 against William Browar and Charles Swibel, the complaints charging that they did own, maintain, operate or control certain cubicle hotels, and sought fines for violations of an ordinance alleged to require the installation of automatic

At the conclusion of the hearing the court found them not guilty, entered judgment accordingly and ordered that they be discharged.

The two cases against William Browar are controlled by our decision in City of Chicago v. National Management, Inc., General Number 47685, opinion filed this day, in which we hold that cubicle hotels are subject to the ordinance involved herein. In the cases against Charles Swibel, as a codefendant, and Marks & Company, the said defendants raised the issue of ownership, maintenance, operation and control. The plaintiff, City of Chicago, introduced no evidence to prove that necessary element of its case. Accordingly, the judgment entered in cause No. 58 MC 406727 in favor of Marks & Company is affirmed; the judgment entered in cause No. 58 MC 406728 in favor of William Browar is reversed; and the judgment entered in cause No. 58 MC 406730 in favor of the defendants therein is affirmed as to Charles Swibel and reversed as to William Browar. This cause is remanded as to William Browar for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and cause remanded.

Dempsey, P. J., and Schwartz, J., concur.

Abstract only.

Publish in Abstract

Gen. No. 11245 Agenda 16

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
Second Division

February Term, A.D. 1959

ROBERT C. BLOOD, Plaintiff-Appellee, vs. ROBERT L. CROSS, Defendant-Appellant.	Appeal from the Circuit Court of Winnebago County, Illinois

SOLFISBURG, J.-

This cause was consolidated for purposes of trial in the trial court with the Cause entitled "Robert L. Cross, Plaintiff-Appellant vs. Robert C. Blood, Defendant-Appellee", No. 11244 in this court on appeal, the opinion in which is this day filed with the opinion in the instant case.

This action for property damage arising out of an auto collision was commenced on September 30, 1957, in Justice Court. The Justice of the Peace entered judgment for plaintiff, Mr. Blood, and against Mr. Cross in the sum of $749.61 and costs, on December 23, 1957, the same day Robert L. Cross filed suit in the Circuit Court of Winnebago County for personal injuries and property damage sustained in the same collision. Cross thereafter appealed the adverse Justice Court judgment to the Circuit Court of Winnebago County and the cases were consolidated for trial only. The cases were tried before a jury which returned a verdict for Blood against Cross in the amount of $500 in the case now before us. Following the denial of post-trial motions, an appeal was taken in this case, No. 11245 in this court, as well as in the companion case of Cross v. Blood, No. 11244 in this court.

Defendant-Appellant has raised several questions on this appeal, but most of them have been disposed of by our decision in the case of Robert L. Cross v. Robert C. Blood, Gen. No. 11244, the opinion in which case is filed simultaneously with the opinion in the instant case, to which

reference is made.

Defendant-Appellant filed a motion to dismiss the action in the Circuit Court, based upon the following alleged defects: (We quote from defendant-appellant's brief.)

> "1. The plaintiff does not have the sole remedial interest in the cause of action.
>
> "2. The Justice of the Peace was, and the court is, without jurisdiction of the subject matter of the action.
>
> "3. There is a prior action pending between the same parties for a cause arising out of the same transaction."

Defendant's Points No. 1 and No. 2, which he considers together, seem to be that because plaintiff Blood and his collision insurance carrier, (under the usual subrogation provisions of a collision policy), were the actual parties in interest in this case, therefore, plaintiff did not have any right to sue in his own name for property damage to his car. Counsel's argument is difficult to follow, and he cites no persuasive authority. In such a case as this, it is settled in this State that suit may be brought in the name of the insured only, even though all except a nominal share of the claim is made on behalf of the insurer as subrogee. Although the Civil Practice Act does not apply to appeals from a Justice of the Peace, (Seron v. Carlson, 280 Ill. App. 396; North American Provision Co. v. Kinman, 288 Ill. App. 414), even Section 22 (3) of the Practice Act (Ill. Rev. Stats., Ch. 110,§22 (3)) which appears to require that suit be brought by or for the use of the subrogated insurer, has been construed otherwise, at least where the insured has a claim for his so-called "deductible". See Osgood v. Chicago & N.W. Ry. Co. 253 Ill. App. 465, and also Byalos v. Mathieson, 328 Ill. 269, 272. Accordingly, defendant's point is not well taken.

Defendant's Paragraph No. 3 in his motion to dismiss does not present a basis for dismissal. Counsel cites no authority which suggests that a cause should be dismissed because there is a "prior action pending between the same parties for a cause arising out of the same transaction."

We know of no authority for holding that, where, as here, there is a prior action pending between parties, another cause of action between the same parties arising out of the same transaction and later sued upon must of necessity take the form of a counterclaim in the prior action, as claimed by defendant-appellant.

We now come to defendant-appellant's last ground for reversal. Plaintiff here sought recovery for damage to his automobile, and a receipted repair bill for the damage sustained for $749.61 was introduced into evidence. The damage to plaintiff's car was apparently not in dispute. No instruction was tendered or given advising the jury as to the proper measure of damages. The jury returned a verdict of $500.00 for the plaintiff.

Defendant maintains that the damages awarded cannot be supported by any theory or any evidence. It is ironical that it is the defendant that is, in effect, urging that the verdict here was inadequate under the evidence. Neither plaintiff nor defendant offered any instruction on the measure of damages, and the trial court was under no duty to do so on his own motion (Swain v. Mehl, 200 Ill. App. 496). If there was any error in the amount of the verdict, defendant can hardly claim he was prejudiced when the jury found him liable to plaintiff and then proceeded to render a verdict against him for a lesser sum than what defendant claims the evidence would support, (Jent v. Old Ben Coal Corporation, 222 Ill. App. 380, 386), especially when he permitted the jury to go uninstructed on the proper measure of damages, (Swain v. Mehl, 200 Ill. App. 496, 499). As was said in Gritton v. Illinois Traction, Inc., 247 Ill.App. 395, 403: "...it is not the province nor the duty of an appellate tribunal to reverse judgments on every error that may intervene in the trial of a case, but should do so only when a party to a suit has been deprived of some substantial legal right."

Having determined that no reversible error was committed, the judgment of the Circuit Court of Winnebago County is hereby affirmed.

Wright, P. J. Concurs

J. Carroll Concurs

Affirmed.

Wright, P. T. Gonowre

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